REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

At Law and in Equity,

AND IN THE

EXCHEQUER CHAMBER,

In Equity and in Error,

FROM

EASTER TERM, 57 Geo. III.

TO THE

SITTINGS AFTER TRINITY TERM, 57 Geo. III.

BOTH INCLUSIVE.

VOL. IV.

By GEORGE PRICE, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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JUDGES

OF THE

COURT OF EXCHEQUER,

During the Period of these Reports.

The Right Honourable Sir R. RICHARDS, Knt. L. C. B.
Sir ROBERT GRAHAM, Knt.
Sir GEORGE WOOD, Knt.
Sir WILLIAM GARROW, Knt.

Sir S. SHEPHERD, Knt. Attorney General.
Sir R. GIFFORD, Knt. Solicitor General.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

AND

EXCHEQUER CHAMBER.

EASTER TERM,

57 GEO. III.

MEMORANDA:

IN the preceding vacation, the Right Hon. Sir *Alexander Thomson*, knt. late Lord Chief Baron of this Court, died at *Bath*: 1817.

Sir *Richard Richards*, knt. one of the Barons of the Court, having been appointed to succeed him, took his seat, as Lord Chief Baron, on the first day of term.

In the early part of the term, Sir *William Garrow*, knt. resigned the office of His Majesty's Attorney General; and, having been called to the

 degree

1817. degree of the Coif, was appointed one of the Puisne Barons of this Court, supplying the vacancy caused by the promotion of Sir *Richard Richards*. His rings bore the device of "*Fas & Jura*."

On the promotion of Sir *William Garrow*, Sir *Samuel Shepherd*, knt. late Solicitor General, was appointed to succeed him as His Majesty's Attorney General;

And the office of Solicitor General was supplied by the appointment of *Robert Gifford*, esq. towards the end of the term, who was in consequence some time afterwards knighted.

By an Act passed during the last vacation, (29 *Mar.*) entitled, "An Act to facilitate the hearing and determining of Suits in Equity in His Majesty's Court of Exchequer at *Westminster*," it was enacted,

That from and after the passing of the act the Lord Chief Baron of the said Court for the time being should have power to hear and determine all causes, matters and things which should be at any time depending in the said Court of Exchequer as a Court of Equity; and that if the said Lord Chief Baron should by sickness, or other unavoidable cause, be prevented from sitting for the purposes aforesaid, then it should be lawful for His Majesty and His Successors to nominate and appoint from time to time, by warrant under the royal sign manual, revocable at pleasure,

pleasure, any one other of the Barons of the degree of the Coif of the said Court for the time being, to hear and determine such causes, matters and things.

II. That the said Lord Chief Baron, or the Baron so to be appointed, should sit at such times as the Lord Chief Baron and such Baron should respectively, with regard to matters to be heard before them respectively, appoint, and whether the rest of the Barons of the said Court should be sitting or not; and that all decrees, orders and acts of the said Lord Chief Baron, or of such Baron, so appointed as aforesaid, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders and acts of the said Court of Exchequer, and shall have force and validity and be executed accordingly; subject only to be reversed, discharged or altered by the House of Lords, upon appeal thereto, and as thereinafter mentioned.

III. That it should be lawful for the said Lord Chief Baron, upon petition by any of the parties concerned, to re-hear any cause or matter before decided, ordered, adjudged or decreed by such Lord Chief Baron, or by any other Baron appointed as aforesaid; and also for any Baron appointed as aforesaid, upon such petition as aforesaid, to re-hear any cause or matter before decided, ordered, adjudged or decreed by him the same Baron, and respectively thereupon to make such order as might be just.

Regula generalis.

1817.

Friday, 25th April.

EASTER TERM, 57 GEO. III.

Rule as to notices of trial.

IT is ordered, That all notices of trial, in causes on the Plea side of this Court, for the Sittings after Term in *London* and *Middlesex*, shall, in case the defendant or defendants reside at a less distance from the cities of *London* or *Westminster* than forty miles, be given eight days before the day appointed or to be appointed by the Lord Chief Baron for the trial of the same causes; and in case the defendant or defendants reside forty miles or upwards therefrom, then that such notices of trial shall be given fourteen days before such day appointed or to be appointed by the Lord Chief Baron as aforesaid, one day being considered inclusive and the other exclusive.

R. Richards.
R. Graham.
Geo. Wood.
W. Garrow.

HOMAN

1817.

HOMAN and another *v.* MOORE and Wife, MILLER, MALING, HUNTER, and GRANT.

Friday, 25th April.

A lessee proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title, not to pay him any more rent; and has been threatened with a distress by his landlord if he does not;—cannot sustain an injunction in Equity to restrain either the ejectment or the distress; for he is not permitted by such means to bring his landlord's title into dispute.

MARTIN, and *Wakefield*, showed cause on the merits, against the order *nisi* for dissolving the injunction which had been obtained in this case, to restrain the defendants *Maling* and *Grant* from proceeding in actions of ejectment commenced against the plaintiffs;—and defendants *Moore* and Wife and *Miller*, from distraining for rent, until a dispute as to the title of the plaintiffs' lessor, should be decided.

The plaintiffs' bill stated, in substance,—that in the year 1805 certain persons, from whom the defendants *Moore* and Wife, and *Miller*, derived title, fraudulently pretending to be seised in fee of the premises, let them to plaintiffs for a term of twenty-one years;—that in *July* 1814 they received a notice from the defendants *Maling*, and *Hunter* (since dead) and *Grant*, trustees of *Maling*, claiming title to the premises, addressed to them as the tenants in possession, requiring them to give up the possession at the end of the year, and in the mean time not to pay any rent to any other person;—that *Moore* and *Miller* had refused to indemnify them against the payment of rent to them, and threatened to distrain for arrears;—and that the defendants *Hunter* and *Grant* had commenced actions of ejectment to recover the possession: and therefore plaintiffs prayed, &c.

1817.

HOMAN and another v. MOORE and others.

The answer of *Maling* and *Grant* stated,—that in *September* 1707 a former proprietor of the premises demised them for a term of ninety-nine years to *Richard Frankwell*, and that defendants *Moore*, Wife, and *Miller*, got into possession of the said premises under the said *Frankwell*, before the year 1806, when the said term expired, and still continued in such possession;—that plaintiff *Maling* became seised of a certain share in the said premises: and denied that *Moore* and Wife and *Miller* had any right or title to the said premises, except through the said *Frankwell*, and by holding over after the expiration of the said term; believing it to be true that a fraud had been practised on the plaintiffs.

The answer of *Moore* and Wife and *Miller* denied fraud; and alleged,—that complainants well knew their title to and interest in the premises, at the time when the lease was made; and denied altogether the title of *Maling* and *Grant*, and the right of the former to convey to the latter, claiming for themselves an absolute interest in the said premises from long and uninterrupted possession of themselves and those under whom they claimed; and admitted their intention to distrain.

Under these circumstances, it was submitted as cause, that the right of the defendants *Moore* and Wife, and *Miller*, had ceased, and therefore the plaintiffs were entitled to pray that the injunction as to payment of the rents, might be continued, till the

the title had been tried at law by the result of the ejectments pending.

[RICHARDS, *Chief Baron.* On what equity? They are your landlords.]

It is shown that they have ceased to be landlords, for the term has expired; and that a gross fraud was practised by those under whom they derive title, in letting the premises for a term beyond their own right of possession.

RICHARDS, *Chief Baron.* Still they are the plaintiffs' landlords; and the tenants cannot be relieved in this way, even if they have demised to them premises which they had no right to let. They cannot so bring their landlords' title into dispute.

Dauncey, and *Roots, contrà.*

Per Curiam.

Injunction dissolved.

1817.

Saturday, 26th April.

HODDER *v.* WATTS and others.

Plea of account stated and settled, to a bill for an account, must be supported by averments showing an actual (though not final) settlement, as from security being given for the balance, and that all vouchers have been delivered up.

Nor is it sufficient that the last fact is stated in a schedule of the statement of the account referred to by the answer, without a positive averment of it in the plea.

TO this bill, for an account to be taken of all monies, bills, &c. and of all dealings between the parties, and, on settlement thereof, for delivering up of all bills of exchange, notes, &c. of the plaintiff in the hands of the defendants, &c. and for an injunction of all actions at law in the mean time,—stating, that no fair or correct account, or any account whatsoever, with proper rests or balances, had been delivered, and that a considerable balance was, in fact, due to plaintiff:—

The defendants pleaded in bar,—as to such part as sought the account of any monies, bills, notes, and other securities and effects, received by defendants previous to the 17th *May* 1815, in the way of their trade or dealings as bankers, from complainant, and of the manner in which they had been disposed of;—That on that day they made up, stated, and settled an account in writing of all dealings, &c. previous thereto, whereby it appeared that there was then a balance of 655*l.* due from complainant to defendants;—and that the said complainant, after examining (together with his solicitor) the said stated account, and every particular thereof, and all the books, vouchers, and accounts of the said banking-house or firm relating thereto, so far as he or his attorney thought proper, did approve and allow of the said account;—and that the said account was stated

stated and settled as in a schedule annexed, which, &c.; - and that the account was a true and just one, according to their knowledge and belief: all which matters and things touching the said stated accounts, and the approval and allowance of the same by complainant, defendants did aver to be true, and were ready and willing to prove, &c. and therefore pleaded such stated account in bar, &c.—And (not waiving, &c.) as to so much of the bill as sought an account or discovery of any dealings, &c. before the 25th *August* 1810, that defendants made up, stated, and settled an account in writing of all dealings, &c. previous, &c. whereby it appeared that there was a balance of 419*l.* 19*s.* 9*d.* in favour of defendants, which was, after examination by complainant, approved, allowed, and subscribed by him; and that he gave the defendants, as a security for the balance thereby appearing to be due, his promissory note for the same, dated 25th *August* 1810, (referring to schedule for the account); at the foot of which was this memorandum:—"1810, *Aug.* 25. Settled the above account, (errors excepted,) when all deeds, papers and vouchers were delivered by Messrs. *Watts* to Mr. *Hodder*." (Signed by *Watts*, *Hodder*, and *Watts*, junior.) Averred it to be a true and just account, according to the knowledge and belief of the defendant, and that all matters and things touching said account, and the approval and allowance thereof, were true, as he was ready to prove: therefore, &c. judgment, &c.

Wingfield, and *Tinney*, in support of the plea, submitted,

1817.

HODDER v. WATTS and others.

submitted, that it was a complete bar to the plaintiff's bill, and contained every necessary averment to meet the general charges made. And they cited the case of *Drew* v. *Power (a)*, as an authority that the Court would not open a settled account, where a security had been taken on the foot of it.

Martin, and *Williams*, *contrâ*, contended that the pleas were bad, because they did not show that there had been a settlement of the accounts by distinct and positive averments, but left it to be collected from the other averments by inference and intendment;—that it did not appear, by the first plea, that the vouchers had been delivered up, or that security had been given for the balance. The second, which was a little more formal, stated a note being given, and had referred to the schedule, where it was stated that all vouchers had been delivered; but still there was no positive averment in the pleas of that fact, as was indispensable. And, admitting that the account need not be shown to be final, yet something like an actual settlement of it should be shown, and averred in terms.

The Court ordered both pleas to stand as a part of the answer, with liberty for the plaintiff to except.

Pleas disallowed.

(a) 1 Sch. and Lef. Rep. 192.

REX

REX (in aid of HORN) v. SCOTT and another, Assignees of WATTS.

1817.
Saturday, 26th April.

It is not matter of conclusion to the country, that the proceedings which have been had are not conformable to or authorized by the usage and practice of the Court: for evidence of such usage is not admissible on that issue.

CARR now moved in arrest of judgment, or that a new trial might be granted in this case, which had been tried before the *Lord Chief Baron* at the last sittings.

The defendants having craved *oyer* of the Inquisition, &c. had pleaded to the Extent which had been issued,—that *Watts* at the time of the extent was a trader within, &c.;—that he was duly declared a bankrupt on the 9th of *January*;—that an assignment was executed of all his estate and effects to the defendants;—that the prosecutor of the extent being so indebted to his Majesty, as in the said inquisition on the said commission is mentioned, did therefore, to wit, on the 7th *December*, &c. in order to oppress the said *David* (the bankrupt,) and to obtain an undue preference over the said other creditors of the said bankrupt, and to deprive them of the payment of their just debts, fraudulently, and without the consent of his said Majesty's Attorney General, procure the said commission to issue, for the purpose of placing their said debt to his said Majesty on record, and did then and there fraudulently, and without such consent, cause the said inquisition to be taken on the said commission; and did then and there fraudulently, and without consent as aforesaid, procure the said extent to issue

1817.

REX (in aid of HORN) v. SCOTT and another.

issue against them, (the prosecutors,) and the said inquisition to be taken thereon, and the said debt, so due from the said bankrupt and *Sarah Rippon*, as in the said writ of extent against them mentioned, to be seized into his said Majesty's hands; and did then and there fraudulently, and without such consent as aforesaid, cause the said writ of extent to issue against him the said bankrupt, and *Sarah Rippon*, and the said hull or hold of the said ship or vessel to be taken and seized under the said last mentioned writ of extent,—*parati sunt verificare*,—wherefore they prayed judgment if, &c.—Replication, *protestando*,&c. &c. Yet the said Attorney General, on behalf of his said Majesty, for replication in this behalf, says, that the said commission, inquisition, extent, and proceedings thereon, were severally procured, had and taken by the said prosecutor, according to *the usage, course and practice* of his said Majesty's Court of Exchequer; and the said last-mentioned proceedings were issued, had and taken under the authority of the same Court, and of the Barons there: and at the several times of issuing, having and taking of such proceedings, the said prosecutor was so as aforesaid indebted to his said Majesty; and the said *David* and *Sarah* were, at the several times aforesaid, indebted to the said prosecutor, &c. &c. (and finally traversing all the other allegations in the plea.)—Rejoinder, traversing that the said commission, inquisition, extent, and proceedings thereon, were procured, had and taken according to the usage, course and practice of the said Court, in manner and form, &c.—concluding to the country—*Similiter*.

On

On the trial, the *Lord Chief Baron* refused to receive evidence of the irregularity of the proceeding, and of the usual and necessary course being, that the consent of the Attorney General should be obtained to authorize and sanction it: ruling, that that was not a question for the jury but the Court; and a verdict was given against the defendant.

On making the present motion, it was stated,—that the defendant was prepared to show the origin of the practice of issuing extents without the consent of the Attorney General; and that it had never been done till within the last twenty-five years. And the question on the record was,—whether, by the usage of the Court, the consent of the Attorney General was necessary to found the proceeding.

But the Court were of opinion, that a question of regularity of practice was not a matter to be put in issue on the record. As well (observed *Mr. Baron* WOOD) might a defendant, in an action on a judgment, plead that that judgment had been irregularly obtained. The only mode by which such a question can be brought on, is by special motion.

Rule refused.

1817.
Friday, 25th April.

ADAMS *v.* EVANS, Clerk.

Where an occupier of lands is plaintiff in an issue directed by this Court to try a *modus*: and proves on the trial that the defendant (the vicar) and his predecessors have not received tithe of hay within a certain township, either in kind or *sub modo*, within *living* memory: and that the vicar and his predecessors have been in possession of a piece of meadow within the same township, said in some of the terriers produced, to have been given in lieu of tithe hay: and no evidence is adduced to rebut such a case on the part of the defendant;—if the jury find for the defendant, under the direction of the Judge, "that they must be satisfied from the evidence that the defendant and his predecessors have held the meadow in lieu of tithes from before the commencement of legal memory,"—it is not ground for a new trial.

THIS was an issue, directed by the Court of Exchequer to try a *modus*, which was the defence set up by the plaintiff (at law) to a bill filed by the defendant, (who was vicar of *Ruyton* in *Shropshire*,)—for the tithes of hay arising from lands in the township of *Wickey*, in the vicarage and parish of *Ruyton*. The answer admitted the vicar's title to all tithes except hay, in *Wickey*; and as to that, pleading (the *modus*,) for that from time whereof, &c. the vicar of the said vicarage and parish church has held, &c. a certain piece of land, containing about two acres, within the said township of *Wickey*, and has taken and enjoyed the profits thereof in lieu of and as a *modus* for all the tithe of hay and clover-grass arising, &c. within the said township of *Wickey*. On the hearing of the cause in the Court of Equity, certain terriers, which had been admitted, were read, dated in 1612, 1693, 1698, 1701; and several others more recent, from 1726 to 1805. The first terrier (of 1612) made no mention of any substitution in lieu of tithes; but one of the items of the vicar's rights noticed therein, was one meadow in the township of *Wykie* in the said parish, containing half an acre, lying, &c. The next terrier (of 1693) mentioned,

amongst

amongst many other things, one meadow at *Wikey given in lieu of tithe hay*. So also that of 1698. That of 1701 called it one inclosed piece, given in lieu of tithe hay. That of 1718 said nothing of any close or meadow, but enumerated, amongst the other sources of the vicar's profits, every tenth cock of hay, when made; the like of clover. The terrier of 1726, which contained the fullest description of the vicarial rights, contained the following item:—"There belongeth to the vicar all tithe of hay and clover throughout the whole parish, except the township of *Wikey*, who refuse to pay it in kind, and is therefore now contested by law." In the next terrier produced, (of 1733,) which was also *full and* particular, was this item:—"There belongeth to the vicar all tithe hay and clover throughout the whole parish, except the township of *Wikey*." And all the subsequent terriers, amounting to a considerable number, contained the same exception in favour of *Wickey*.

These terriers having been read, the Court inquired what answer the vicar's counsel could give to them; when, after reading the answers of two witnesses *(Crisp* and *Ireland)* to the second and third interrogatories, in which they deposed, that the vicar was *reputed* to be entitled to tithes of hay within the said vicarage,—the Court said, that they could not make a decree in favour of the vicar on such evidence, in opposition to the terriers, but must dismiss the bill with costs: and the counsel for the vicar then claimed a right to have an issue, which was ordered.

Dauncey,

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Dauncey, and *Benyon*, for the plaintiff, in equity.

Fonblanque, and *Courtenay*, for the defendant.

On the trial of the issue, in addition to the above terriers, it was proved that no tithe of hay had ever been paid in kind, in *Wickey*, within living memory, and that some old people, deceased, had been heard to say, that the meadow in *Wykie* had been given to the vicar in lieu of it. But the learned Judge *(Abbott)* before whom the cause was tried at *Shrewsbury*, at the last assizes, directed the Jury,—that proof of no tithe having ever been rendered in kind within living memory, was not alone sufficient to sustain the plaintiff's case;—that further proof was necessary to entitle him to succeed on this issue, which was that the alleged compensation had been enjoyed *immemorially*; which word did not mean beyond what time memory could carry it, but beyond legal memory, which was a period of 600 years;—and that as to the terriers it was to be remarked, that the first, and oldest, did not speak of the meadow having been given in lieu of tithe of hay, but merely enumerated it amongst the vicar's possessions; and his Lordship observed, that it was impossible that that terrier should have been silent on that fact if it were so, and he added, that the word used in the terriers was "*given*," which was also matter of observation, as implying something modern.

On that direction the Jury found a verdict for the vicar, (the defendant at law.)

A rule

A rule had been obtained, to show cause why there should not be a new trial granted, on the ground of a mis-direction, by which the Jury had been led, at least, to consider that the plaintiff ought to have carried his proof beyond the common *primâ facie* case; which, it was submitted, it was not incumbent on him to do.

RICHARDS, *Baron*, having read the report of the learned Judge; wherein his Lordship explained, that the cause being tried by a common Jury, his object was merely to guard them from the vulgar error, that immemoriality meant merely time beyond living memory, whereas it in fact meant legal memory, which went as far back as the reign of *Richard* II. and that they must be satisfied that the defendant and his predecessors had enjoyed the meadow for so long a time, or they must find a verdict for him.

Dauncey, and *Taunton*, *W. E.* showed cause; submitting, that the *onus* lay entirely on the plaintiff at law; and that as he had failed in satisfying the Jury, under the direction of the Judge, who had not expressed disapprobation, the verdict ought to stand.

Fonblanque, *Jervis*, *Courtenay*, and *Puller*, in support of the rule, pressed the arguments used on the former occasion, and contended, that the direction as to the meaning of legal memory, ought to have been carried further, and so explained, as that the Jury might not have supposed that the plaintiff was actually to prove the defendant's predecessors to have been in possession 500 years ago. And

 they

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they also submitted, that too much stress was laid on the language of the terriers, as importing that the vicar had become possessed of the meadow within legal memory.

RICHARDS, *Chief Baron.*—This is an application of rather a singular nature. At first the motion was put on the ground of a mis-direction; now it is admitted that the law was correctly stated, but it is contended that the direction was not sufficiently explained, whereby the Jury were misled.—(His Lordship commented on the terms of the direction with approbation, and then went through all the terriers, observing, that the remark made on the first terrier was obvious, and that it went far to destroy the presumption of a modus.)—On the whole, (continued his Lordship,) I think the Jury would have been much more misled if they had found a verdict, on this evidence, for the plaintiff; for as to the non-payment of the tithes alone, that would be of no weight when the proof of the equivalent fails.

GRAHAM, *Baron.*—This was originally a proper question for a Jury, and I think that they have not drawn a false conclusion. This motion was not made on the ground of its being a verdict against evidence; and the direction of the learned Judge I think quite unexceptionable, in explaining to the Jury that the term immemorial signified beyond *legal* memory,—a more remote period than beyond *living* memory.

WOOD,

WOOD, *Baron*, could not concur.—(His Lordship stated the issue.)—I admit that the burthen of proof lay on the plaintiff, that the substitution was immemorial. There is no plea or allegation that this was a composition, therefore we have nothing to do with that. I hold that there is no difference in the mode of proof of a modus, or any other prescription pleaded. Now what was the proof in this case? It is not pretended that tithes have ever been paid for this township within the memory of man; and had this been the case of ecclesiastical persons, who alone may prescribe in *non decimando*, this would undoubtedly have been sufficient, unless rebutted by other evidence.

Then this meadow is stated to have been given to the vicar as an equivalent; and what proof is there that it has not been enjoyed from time immemorial? That it has been enjoyed from 1612, there can be no doubt. The terrier does not say, "in lieu of tithes," it is true; but if it had not been given in lieu of tithe of hay, is it probable that the clergy would at that time have abandoned their rights? In 1701, however, there is a terrier which expresses that it was given in lieu of tithe hay, and surely that, at least, is good evidence. As to the word *given*, on which a stress has been laid, there could have been no other used. The word given does not necessarily import any thing modern; and the subsequent terriers are declaratory of the foundation of the gift. The dispute mentioned in the terrier of 1726, could only be as to whether the

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land was held in lieu of tithes or not; and of course the origin of the gift might have been ascertained, if it were even then a recent gift, but the result of that suit was, that the vicar gave it up. All the other terriers have the same declaration, of the meadow being held in lieu of tithes from thence down to the time of filing this bill.

The nature of a prescription (and so it is described by Lord *Coke*) is this:—By proving usage as far back as living memory can reach, the opposite party is called on to rebut the presumption arising from it by contradictory evidence: that is what we call establishing a *primâ facie* case; but it is nevertheless actual proof, as far as it goes, and must be answered. I should be sorry to say any thing in disapprobation of the learned Judge's direction, whose abilities we all well know; but he must have been misunderstood by the Jury, who must have thought that positive proof was necessary, to show that the origin of the gift was 600 years old, and it is that which should have been explained to them.

As to reputation, that is not essential or necessary to support a prescription. Reputation is certainly a strong circumstance of confirmation, but a prescription may be well proved without. But in fact there is evidence of reputation here; for some of the witnesses say, that they have heard from old people that the meadow was held in lieu of tithes. If they had said more it would have been suspicious. There was therefore more evidence than is necessary,

sary, to prove that this was not a modern gift; and I am of opinion, that the case ought to undergo another investigation, but which of course will not now be ordered.

Rule discharged.

The following Notice was published in the Court:—

28th *April* 1817.

SITTINGS OF THE COURT OF EXCHEQUER IN TERM.

In the Exchequer Chamber.

Mondays, Tuesdays, Wednesdays, Thursdays,	The Lord Chief Baron will hear causes, and matters by petition, on these days, except either of them shall happen to be the first or last day of term. All causes for further directions are to be brought on at the sitting of the Court on Thursdays only.
Fridays, Saturdays,	The Lord Chief Baron will hear causes on these days, after the revenue business in the Outer Court is disposed of, if there be time.

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In the Outer Court.

Mondays, *Tuesdays,*	The Court will hear exceptions, pleas, and demurrers, in injunction causes, and motions in equity and common law.
Wednesdays,	The Court will hear exceptions, pleas, and demurrers, in causes not being injunction causes, on these days only. The Court will also hear on these days, exceptions, pleas, and demurrers, in injunction causes, and motions in equity and common law.
Thursdays,	The Court will hear exceptions, pleas, and demurrers, in injunction causes, and motions in equity and common law.
Fridays, *Saturdays,*	The Lord Chief Baron will sit with the rest of the Court, to hear motions in revenue matters. After such motions are over, the Lord Chief Baron will adjourn to the Exchequer Chamber to hear causes and petitions; and the rest of the Court will continue to sit to hear other matters.

All applications for transfer of stock, or payment of money out of Court, where decrees have been made, are to be by way of petition, similar to the practice in Chancery.

29th

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29th *April.*

The *Lord Chief Baron* sat apart from the rest of the Court in the Exchequer Chamber this day, for the first time, under the late Act of Parliament.

1817.

Friday, 2d May.

PHELIPS, Esq. *v.* BARRETT.—(Demurrer.)

A sheriff is not authorized by the 23d *H.* VI. cap. 10, to let out of custody on bail, a defendant taken under an attachment, issuing out of Courts of law for non-payment of costs, because such a process is in the nature of, and in effect, an execution.

Plea to an action of debt, on such a bail-bond,—that it was given to the sheriff under such circumstances, held good on general demurrer.

THE plaintiff declared in debt on bond.—Plea, (setting out the bond on *Oyer*, which was in fact a bail-bond given by one *Thomas Dunster*, and three persons his sureties, (of whom the defendant was one,) to the plaintiff as sheriff of the county of *Somerset*, in the sum of 47*l.* 4*s.* (dated 15 *May* 1815,) conditioned for the appearance of the principal *(Dunster)* before the Barons, &c. on the morrow, &c. to answer his Majesty concerning divers trespasses, contempts, and offences by him lately done and committed,)—*onerari non*, because before the sealing, &c. a certain writ of our said Lord the King, called an attachment, was sued and prosecuted out of the said Court before the Barons, &c. directed to the sheriff of *Somersetshire*, by which he was commanded to attach the said *Dunster* and *John Doe*, by their bodies, wheresoever, &c. and them safely keep, so that he might have them before the Barons, &c. on the morrow of the *Holy Trinity* then next coming, to answer our said Lord the King concerning divers trespasses, contempts, and

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offences by them lately done and committed; and that the said sheriff should have then there that writ, which writ was endorsed as follows: "By "rule of Court made the 12th day of *April* 1815, "in a cause, *Blinman* and another against *Dun-* "*ster*, for non-payment of 23*l.* 12*s.* with costs "of attachment;" which said writ, so endorsed as aforesaid, being an attachment for a contempt for non-payment of the said costs endorsed on the said writ, was afterwards, &c. delivered to, &c. (the said sheriff;)—that the said *Dunster* was thereon arrested by the sheriff, and that he, by colour of his office, took bail for the appearance of the said *Dunster* at the return of the writ. To that plea there was a general demurrer and joinder.

[On the original action being commenced against *Dunster*, he paid money into Court, which the plaintiff took out; and having got his costs taxed, and a rule for payment served, issued the attachment for contempt on non-payment.]

Moore, in support of the demurrer, contended, that the bond which had been taken was valid on the construction of the statute 23 *H.* VI. c. 10;—that the defendant in the former action was in custody in consequence of an action personal (in the words of the statute) against him;—that by the writ of attachment a day was given him to appear and answer generally;—that an attachment was not an execution within the exception of the act, which was made in favour of liberty,—and that an action would lie against a sheriff for refusing bail in such a case. And he cited

cited the case of *Lawson* v. *Haddock (a)*, where it was recognized as being the constant practice for sheriffs to take bail-bonds in such cases. In Equity Cases abridged *(b)*, it is said, that "if one be taken up on an attachment, either in process, or *in execution after a decree*, yet in both cases, on his appearing before the Register, he is to be discharged, and to answer the interrogatories at large, not in custody;" and in *Pl.* 4,—"So if the sheriff take one up on attachment in process, he is to give a bond of 40*l.* penalty to the sheriff to appear and answer; but for one taken up *in execution after a decree*, the sheriff may insist on security proportionable to his duty: but in both cases, on the Register's certificate that the party has appeared, the sheriff is to deliver up the bond;" for which is cited there, *Danby* v. *Lawson*, *Hil.* 1700, and 1 *Prec. in Chanc.* 110. He cited also *Rex* v. *Dawes (c)*, *Burton* v. *Low (d)*, *Lawson* v. *Haddock (e)*, an anonymous case in *Atkyns (f)*, and *Rex* v. *Aylett (g)*, cited in *Tidd's Practice (h)*, whence (it is there said) it seems that the sheriff may take bail where the attachment is *for non-payment of money*;—and, finally, the more recent case of *Morris* v. *Hayward (i)*, where, after much argument and time taken to consider the point, it was held, that a sheriff might recover on a bail-bond taken for the appearance of a person against whom

(a) 2 Ventr. 237.
(b) P. 351. pl. 3 & 4.
(c) 1 Ld. Raym. 722.
(d) 2 Salk. 608.
(e) Style, 212, 234.
(f) 2 Vent. 237.
(g) Vol. ii. p. 507.
(h) Tidd. Pr. 220.
(i) 2 Marsh. 280. and 6 Taunt. 569.

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an attachment had issued out of Chancery, and that such a bond was wholly untouched by the statute 23 *H.* VI. c. 10.

Gaselee, contrâ, submitted, that as the attachment, in the present instance, was not merely for non-appearance to mesne process, or other contempt, which might be subsequently cleared, but was, in effect, in the nature of an *execution* for a certain sum of money, it was within the exception in the statute 23 *H.* VI. c. 9*, and was therefore not bail-

* And that the said sheriffs, and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them arrested, or being in their custody, by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprise, to keep their days in such place as the said writs, bills, or warrants shall require. Such person or persons which be or shall be in their ward by condemnation, *execution, Capias Utlagat'* or *Excommunicatum*, surety of the peace, and all such persons which be or shall be committed to ward by special commandment of any justice, and vagabonds refusing to serve according to the form of the statute of labourers only except. And that no sheriff, nor any of the officers or ministers aforesaid, shall take or cause to be taken, or make, any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, not by any person which shall be in their ward by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require. And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation in other form by colour of their offices, that it shall be void.

able

able by virtue of that act. In the case of *Bland* v. *Riccards* (*k*), a bond taken merely for an appearance to an attachment out of Chancery had been held void, the defendant not being bailable; and he cited *Viner's Abr.* p. 459, tit. Bail, to the same point. In an anonymous case in *Strange* (*l*), it was resolved that a *sheriff* could not take bail on an attachment. And in *Studd* v. *Acton* (*m*), the Court of Common Pleas held, that an action would not lie against the sheriff, for not taking bail on an attachment out of Chancery; which showed that such a proceeding was not considered as within the statute. An attachment is in the nature of a criminal proceeding, and a bond taken on an arrest, under a bench-warrant issued by the Quarter Sessions, on an indictment, was held void in the case of *Bengough* v. *Rossiter* (*n*).

Moore replied; submitting, that if the sheriff were not compellable to take bail in such a case, as being one within the exception in the statute, or not punishable by action or indictment for refusing to do so, yet there could be no reason why, if he should take a bond, he might not recover on it for a breach of the condition; for that taking such bonds was not prohibited by the statute, and that they were therefore not illegal, as had been clearly shown by the cases already cited to have been frequently held, and

(*k*) 3 Leon. 208.
(*l*) Vol. i. 479; and Field v. Workhouse, Com. Rep. 264.
(*m*) 1 H. Bl. 468.
(*n*) 4 T. R. 505; and 2 H. Bl. 418.

that

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that even where taken on an attachment in execution after a decree.

GRAHAM, *Baron.*—I certainly felt a degree of doubt in my mind on the cases which have been cited in support of the demurrer; particularly those from Precedents in Chancery, and Equity Cases abridged, and which appear to have been followed in the case of *Morris* v. *Hayward*, where the Chief Justice seems to have taken it up as if there was no objection to such bonds, when given on an attachment in execution after a decree.

But in neither of the cases cited, does there appear to be any thing applying to cases like the present. We were also referred to *Tidd's Practice*, but what is said there appears to be merely a *dictum*. The sum which was required by the order to be paid, was awarded as taxed costs. The sheriff takes upon himself, on executing the attachment for non-payment, to take a bail bond. Now the whole argument on the part of the sheriff goes to admit, that the statute only allows him to grant ease and favour in particular cases; but there is an express exception of executions, and other final process.

The question then is, whether this process is not in the nature of an execution; for if it be, the sheriff was not warranted in taking bail by this act of parliament. If the statute has excepted this process, the sheriff acted contrary to his duty; and if so, without saying that an indictment would lie, he has

has at least done what he was not warranted in doing, and what he must not be permitted to do. Notwithstanding the cases which have been cited, therefore, where it has been done on attachments issuing out of courts of equity, it is not going too far to say, that bail may not be taken on arrests under attachments issuing out of courts of law, and under attachments for non-payment of costs especially, because they are to all intents and purposes executions. Where they are issued for mere contempts in not appearing, they are on a very different footing, for as soon as the party appears and clears his contempts, the object is answered, and the whole is at an end.

WOOD, *Baron*, of the same opinion.—The question is, whether the sheriff is authorized to take a bond in such a case as this, under the statute of the 23 *H.* VI. ch. 10.—[*Here his Lordship read the Clause of the Act.*]—The defendant in this case was taken on an attachment, to answer for a contempt in not paying the sum of 23*l.* 10*s.* which he had been ordered to pay for costs. That was no doubt, in effect, an execution. It was not a process, by which he was ordered to appear, to show cause why he should not pay the money; but the order was absolute on him to pay it, and if he had come in, he could have given no answer, and therefore he must have remained in prison till it was paid. The statute applies to persons arrested and in custody on mesne process, and there is good reason for such a provision; but if it were extended to executions, a man

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a man could not be compelled to pay, and it is admitted by the plaintiff's counsel, that in cases of a common law execution, a sheriff is not empowered to take a bond. It was equally the sheriff's duty, in this case, to have taken the money, and not a bond. As to proceedings in courts of equity, they appear to be regulated by analogy with the equity of this statute. Some loose expressions have been alluded to, as applying to attachments issued on decrees, but they must be taken to have relation to decrees in equity, whereby certain duties are required to be performed. But a sheriff cannot bail a defendant taken on an attachment for non-payment of costs, and in practice it is never done, nor do the words of the statute warrant it. Then it is said, that if he does take a bond in such a case, that it does not follow that the bond would be necessarily void, but that he might recover on it. I, however, think otherwise; for it is contrary to law to take such a bond, and herefore it would not be right to permit him to do it.

Judgment for the Defendant.

BODENHAM

1817.
Wednesday, 7th May.

BODENHAM and others *v.* BENNETT and others.

Where a valuable bank parcel sent by a stage coach is lost, and it is proved that on the arrival of the coach, the driver was in liquor, and that the bookkeeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it:—held to be a loss arising from gross negligence, and that the proprietors were liable as carriers for the value, notwithstanding they had put up the usual notice in their office, disclaiming liability to make good losses beyond £. 5.

CASE against common carriers, for losing a parcel.—Plea, Not guilty. At the trial at the last *Hereford* summer assizes, before RICHARDS, *Baron*, and a special jury, a verdict was found for the plaintiffs, for 347*l.* 11*s.* The case was thus:—

The defendants were proprietors of a coach which ran from *Hereford* to *Brecon*, and thence to *Carmarthen*, and had given the usual notice that they would not be liable for parcels above 5*l.* unless insured and paid for accordingly. The plaintiffs were bankers at *Hereford*, and were in the habit of sending parcels of *Welch* notes to Messrs. *Wilkins*, bankers at *Brecon*. These parcels were always sealed in a particular manner; and the bookkeeper knew that they contained *Welch* notes. On the 17th *August* 1815 the plaintiffs' clerk took a parcel, sealed in the usual manner, containing notes to the amount of 347*l.* 11*s.*, to the coach-office, to go by the coach to *Brecon* on the following morning. He paid a halfpenny for carriage and booking: no insurance was demanded, or paid. On the following morning the parcel was entered in the way-bill, and put in the back seat of the coach. There were two other parcels also entered in the way-bill. There were no inside passengers when the coach left *Hereford*. When the coach arrived at *Brecon*, the bookkeeper there, who usually unloaded the coach, received the way-bill, and took the two other parcels out

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out of the front seat of the coach; he did not look for the bank parcel, because the coachman usually carried it in his side-pocket. The coachman, on that day, was intoxicated, but not so as to be unable to attend to his business. After waiting a quarter of an hour at *Brecon*, the coach proceeded on to *Carmarthen*.

The learned Judge stated to the jury the common-law liability of carriers, and that they might stipulate to restrain it by notice. That they had given such a notice in this case, and therefore the question was, whether there had been gross negligence in the carrying of this parcel. He then detailed the evidence to the jury, who found for the plaintiff to the amount of the notes.

Taunton moved for a new trial.

Dauncey, and *Peake*, showed cause; and cited *Ellis* v. *Turner* (a).

Taunton, *Owen*, and *Puller*, supported the rule, and cited *Tyly* v. *Morris* (b), *Gibbon* v. *Paynton* (c), *Harris* v. *Packwood* (d), *Nicholson* v. *Willan* (e), *Beck* v. *Evans* (f), *Levi* v. *Waterhouse* (g).

GRAHAM, *Baron*.—I do not think there is much

(a) 8 T. R. 532.
(b) Carth. 485.
(c) 4 Burr. 2298.
(d) 3 Taunt. 264.
(e) 5 East. 507.
(f) 16 East. 244.
(g) 1 Price, 280.

difficulty

difficulty in this case, as the law now stands. By the old law, the carrier was bound to take the strictest care of the property entrusted to him; but of late it has been conceded, particularly in *Nicholson* v. *Willan*, where *Lord Ellenborough* gave up his former opinion, that the liability of the carrier may be qualified, and that he may require an additional premium for the risk he runs; but yet he must take due care of parcels, and if he neglects them, he is still liable. But supposing he is only chargeable for gross negligence: let us see in this case whether there has been that gross negligence. Observe the nature of the parcel sent from *Bodenham* to *Wilkins*; such parcels had been often sent, and the moment the parcel was delivered, all persons in the defendant's employ must have known that it was a parcel of value. But when the coachman comes to *Brecon*, he gives the way-bill to *Peters*, who sees from the bill that it is a package sent in the usual way of such valuables, and directed to the bankers. *Peters* says, "I took two parcels out of the coach; I did not look for the other parcel." Why not?—"I concluded it was carried by the coachman, as he usually carried such parcels." Now it is clear the coachman was not in a situation to take care of it; and *Peters* says he was a drunken man. He ought to have asked the coachman for it, when he saw he was in liquor. So strongly am I of opinion that this was gross negligence, that I think it was the very way to facilitate theft. I do not say it was done for that purpose; but I cannot help thinking that the parcel was stolen between *Brecon* and *Carmarthen*. I agree with the defendants' counsel,

 that

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that the defendants would not have been liable if ordinary diligence had been used; but being strongly of opinion there was gross negligence in this case, I think the verdict was right.

WOOD, *Baron.*—I am of the same opinion. I see no ground to disturb the verdict. By the common law, the carrier was liable for losses arising from accident or robbery; nay, from irresistible force. The case of *Morse* v. *Shee (h)* pressed extremely hard on common carriers. Then special conditions were introduced, for the purpose of protecting carriers from extraordinary events; but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms. It only means, that they will not be answerable for extraordinary events: but we need not, in this case, lay down that rule. Here has been gross negligence, and in all cases of that sort carriers are liable. The parcel was delivered at *Hereford*; it was entered in the way-bill; for any thing that appears, it gets to *Brecon*, where it ought to have been delivered. The carrier does not merely engage safely to carry and convey; he also engages safely to deliver. Have they taken care to deliver? Nobody looks for it. The bookkeeper saw it down in the way-bill: he knew it was to be delivered at *Brecon*, but never looks for it,—not the least in the world. He says, "I trusted to the coachman:" he, I suppose, would say, "I trusted to the bookkeeper." It is plain

(h) 1 Ventr. 23.

they

they never cared any thing about it. What can be grosser negligence? In all probability the parcel was left in the coach and went on to *Carmarthen*, and was lost there or in its passage. If the defendants let it go further than *Brecon*, according to *Ellis* v. *Turner*, they are liable. Put it any way, I see no ground for disturbing the verdict.

GARROW, *Baron*.—This is a case of considerable importance to the public. I entirely agree with the law as laid down by my learned brothers, and it is unnecessary for me to add any thing to it. Every body who has had any thing to do with carriers, must know, that if this case had received a contrary decision they would have had no security whatever. The carriers would have said, "You may enter into my lottery of a common carrier, where there are a hundred blanks to a prize,—where it is a hundred to one if your parcel arrives safe." But this case will teach them that it is their interest to employ persons capable of attending to their duty. I think the law was distinctly laid down to the jury, and that it was a question of fact proper for their consideration. Had I been one of the jury, I should have found that there was gross negligence,—extreme negligence. If the verdict had been the other way, I should certainly have been of opinion that there ought to have been a new trial.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

(IN ERROR.)

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Thursday, 8th May.

DEFFELL *v.* BROCKLEBANK.

In an action on a covenant, —(that on the arrival of the plaintiff's ship at a certain port, where he undertook to receive the defendant's cargo, and sail for England therewith with the next June convoy, provided the ship arrived and was ready to load 65 running days before the sailing of such convoy,)—the defendant would provide a cargo of produce in time for her to load the same, and join the June convoy for England, provided she arrived out and was ready to load, and notice thereof was given to the agents of the plaintiff in Error 65 running days previous to the sailing of the said convoy, and on her arrival, &c. receive the said cargo and pay the current freight:)—it is not a condition precedent to the *defendant*'s part of the contract, that the ship should so arrive, but he is still bound to supply a cargo, though not in time to enable the plaintiff to sail with that convoy.

And to a breach assigned, that though, &c. (averring the arrival and being ready to load) the defendant did not provide a sufficient cargo in time to enable her to sail with that convoy, but detained the ship for a certain time after the sailing of the convoy, whereby, &c.: it is no answer to plead that the defendant did not so detain the said ship, &c. the gist of the action being the not loading her, &c.

THE declaration (covenant) stated,—that the plaintiff (in error) on the 13th of *January* 1812, by a certain charter-party of affreightment made between the defendant (in error) as part and managing owner of the ship *Balfour*, then lying at *Whitehaven*, whereof *James Gunson* was master, of the one part, and the said plaintiff of the other part, it was witnessed, that the said defendant had let, and the said plaintiff had hired, the said ship, to freight for the voyage, upon the terms and conditions thereinafter mentioned; whereupon the said defendant *did thereby covenant*, promise, and agree with the said plaintiff, *that the said ship should proceed* from *Whitehaven* (with liberty to call at *Cork* if required) *to Montego Bay, and upon arrival there, she should* be made tight, &c. and be well manned, victualled, equipped, provided and furnished with all things necessary for the voyage,

and

and should thereupon *take and receive on board* from the agents or assigns of the said plaintiff in *Montego Bay*, from and out of the usual *barquadiers*, with the assistance of the ship's boats, &c. and at the ship's expense and risk (unless any part of the cargo should be shipped from *Little River*, in which case it was understood that the draggerage attending the shipment of such part of the cargo, which was not to exceed 120 casks of produce, was to be borne by the said parties in equal moieties,) *the quantity of* 450 *casks of sugar and* 200 *puncheons of rum, and such a quantity of wood* as might be necessary to stow the cargo, (provided the agents of the said plaintiff gave notice to the said master of such their intention within ten days after his arrival,) for which the said master should and would sign the accustomary bills of lading; *and that the said ship being therewith dispatched, should set sail with the convoy that should depart from* Jamaica *for* England *in the month of* June *then next*, PROVIDED *the said ship arrived out, and was ready to load, sixty-five running days previous to the sailing of such convoy*: which days were to be accounted from the day of her arrival in *Montego Bay* aforesaid, and being reported ready to receive goods and proceed under sailing instructions from the said convoy back to the said port of *London*, and upon her arrival there, deliver her said cargo in the *West India Docks*, &c. In consideration whereof the said plaintiff covenanted not only to provide 650 casks of produce, as above stated, &c. but also to pay a certain freight.

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Averment,—that the ship sailed on the 30th *January* from *Whitehaven*, and arrived in *Montego Bay* 26th *April*, and was ready to receive on board a cargo of sugar, &c. according, &c. whereof notice was given to the agents of the said freighter;—and that the said ship did at *Montego Bay* receive, take, and load on board such a cargo of sugar, &c. as the agents of the said plaintiff thought fit to load on board;—and that in all other respects the defendant fulfilled the said agreement on his part.

The first breach alleged,—that the said plaintiff did not provide the said 650 casks of produce, as &c. but loaded on board a much smaller quantity, (viz. 156 hogsheads of sugar, and 24 puncheons of rum,) the same being a very insufficient and incomplete cargo for the said ship, and contrary, &c. to the damage of said defendant of 2,500*l.*

The second breach alleged,—that although the said ship arrived out at *Montego Bay*, and was ready, &c. and notice was given to the agent of the said plaintiff sixty-five running days previous to the sailing of the said *June* convoy from *Jamaica* for *England*, yet the said plaintiff did not provide, or cause to be provided, a sufficient cargo of produce, according to the terms and stipulations of the said charter-party, to be laden on board the said ship at the usual *barquadiers* in *Montego Bay* aforesaid, in time sufficient for the said ship to join the said *June* convoy from *Jamaica* to *England*, on her homeward-bound voyage to the port of *London* aforesaid;

aforesaid; BUT *the said plaintiff detained the said ship* at *Montego Bay* aforesaid, for a further long space of time, to wit, for the further space of thirty days after the sailing of the said *June* convoy, contrary, &c.; whereby the said defendant, during all that time, not only lost the use and benefit of the said ship, but was also put to great expense in and about the maintaining and paying the crew thereof, and was likewise prevented from earning and recovering so much freight and primage as he otherwise might and ought to have done, to a large amount, to wit, to the amount of 2,500*l.* And so, &c.

Plea 1st, *Non est factum.*—2d plea to 1st breach: That defendant ought not, &c. because the said ship, upon her arrival at *Montego Bay*, was loaded with a cargo, to wit, 250 ton of coals; which said cargo of coals was not discharged from the said ship for a long space of time, to wit, for the space of one month from the time of her arrival there; and that there did not elapse sixty-five running days from the time when the said ship had discharged the said cargo of coals, and was ready to receive a cargo of sugar, &c. to the time of the sailing of the *June* convoy from, &c.—3d plea to 1st breach: That at the time said ship was reported ready to receive goods at *Montego Bay*, to wit, 27th *April*, the said *June* convoy stood *appointed to sail on* 20th *June* following, whereof, &c.; and inasmuch as sixty-five running days could not elapse between, &c. the said charter-party became void.—4th, That such ships and vessels of *June* convoy as departed and sailed from *Montego*

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Bay, departed and sailed on the 29th *June*, and within the period of sixty-five days from the day ship reported ready, &c.; whereby said plaintiff was discharged from his covenant, &c.—5th, That said ship was not reported ready, &c. sixty-five running days before the *June* convoy was appointed to sail and depart.—6th plea to both breaches: That the ship was not reported ready, &c. sixty-five running days before the said ships and vessels of the said *June* convoy at *Montego Bay* departed and sailed from thence, by reason whereof the said charter-party became void.—7th to 2d breach: That the ship was not reported ready to receive goods sixty-five running days before said *June* convoy was appointed to sail, or before the ships and vessels of said *June* convoy did depart and set sail from thence; and that the master of said ship in said charter-party mentioned, voluntarily and of his own accord, without being required thereto by said plaintiff, or detained by him, remained at *Montego Bay* after the sailing of the said *June* convoy.—8th, Protesting, &c. that the ship did not arrive out, and was not ready to load at *Montego Bay*, sixty-five running days previous to the sailing of the *June* convoy; averred that the said plaintiff did not detain the said ship at *Montego Bay* for any time whatever after the sailing, &c. in manner and form, &c.—9th, That after receiving the goods mentioned in the declaration, and before the residue, &c. were or could be procured, the master voluntarily sailed with such incomplete cargo.—10th, That said plaintiff was not bound to provide the cargo in the said declaration mentioned, for the said ship to be loaden at the usual

usual *barquadiers* in *Montego Bay*, in time to load the same and join the *June* convoy, &c. unless the said ship should arrive at *Montego Bay*, and be there reported ready to load, in sufficient time before the sailing of the said convoy, to be and remain in *Montego Bay*, for the purpose of loading there sixty-five running days before the said ship should be obliged to leave that place in order to join the said convoy.—Last plea: That plaintiff did not detain the said ship at *Montego Bay* for any space of time whatever after the sailing of the said *June* convoy, in manner, &c.

Replication to 1st plea: *Similiter* added, and issue joined.—Demurrer to 2d, 3d, 4th, 5th, 6th, 8th, 10th, and last pleas.—Replication to 7th plea: *Precludi non*; because the said ship was reported ready, &c. sixty-five days before the said *June* convoy actually did depart, &c.—To 9th plea: That after said ship was ready, &c. and before the said master of the said ship set sail and departed from *Montego Bay*, as in the said 9th plea alleged, a reasonable time elapsed for the said plaintiff to deliver and cause to be delivered 650 casks of produce, as above stated, for the said ship to be loaden at the usual *barquadiers*, in *Montego Bay* aforesaid, and such a quantity of wood as was requisite to stow the cargo for the said port of *London*; and that before the said ship set sail and departed, &c. said plaintiff did not, &c.—Rejoinder.—Judgment on demurrer, that said pleas, 2, 3, 4, 5, 6, 8, 10, and last, are not sufficient in law to bar said defendant (in error) from having and maintaining, &c.

Parke,

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Parke, in support of the errors assigned, submitted, as to the 1st breach,—that the plaintiff was discharged from the covenant to load the ship, because 65 days could not elapse between the time of the arrival of the ship, and the sailing of the *June* convoy; for, as that was a condition precedent to the whole contract, on which the plaintiff had agreed to freight the vessel, the charter-party became void by the ship's not arriving out 65 days before the sailing of the convoy. And he cited the case of *Shadforth* v. *Higgin (a)*, where Lord *Ellenborough* held, that a similar provision not having been complied with, discharged the freighter.—That as to the second breach, (he submitted,) that it was sufficiently answered by the pleas denying the detention of the ship; because the introduction of the word *but*, in the assignment of that breach, makes the detention the substantial part of the breach, and narrows the allegation, as was held in *Harris* v. *Mantle (b)*, so as to render proof of the detention necessary in order to support the action on that ground. This being an action for damages on the whole declaration, if any breach is bad, or answered, the judgment must be reversed.

Gaselee, for the defendant in error, submitted,—that the proviso in the covenant did not go to the whole contract, but was meant for the protection of the ship-owner, on the one hand, in case the vessel should not arrive so long before the sailing of the convoy as 65 days, from any liability in consequence of

(a) 3 Camp. 385. (b) 3 T. Rep. 307.

not

not sailing with the convoy; and of the freighter, on the other, for not loading her in time to do so, unless she arrived so many days before;—and that it was not applicable to the covenant to load the vessel *generally*, which the plaintiff was bound to do in all events; but merely to the time of doing so, as that, if the ship arrived in time, he was then only to load her by a particular period: and that is the true construction of the covenant. As to the case which had been cited from *Campbell*, he submitted, that the proviso in that case was attached wholly and distinctly to the freighter's part of the contract; and that the doctrine of the decisions collected in the note to that case, was more in point on the present question, which went to show, that this part of the covenant ought not to be considered as a condition precedent to the whole contract. With respect to the 8th, 10th, and last pleas, being an answer to the 2d breach: he contended, that the *gravamen* of that breach being the not loading the vessel, the detention was merely in aggravation of the damages sustained thereby, and that the denial of the detention merely, was no answer.

Parke, in reply, pressed,—that the case cited had not been distinguished from the present;—that the repetition of the proviso made it a condition precedent to the whole engagement of the plaintiff, and the time of the arrival of the ship was thereby made the criterion which was to create the obligation on his part, or to discharge him; for that that circumstance

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stance would make a material difference to the trader, as to the advantages of freighting the vessel with produce, and he was not to be considered bound to keep his cargo until any indefinite time at which the ship might arrive. And he insisted, that the last breach was answered fully by the pleas thereto.

GIBBS, *Chief Justice.*—The amount of the damages recovered, renders it very important to the plaintiff that our judgment should be given immediately; and as the case has been so well argued on both sides, and with such close adherence to the points as to obviate any misconception, we have no difficulty in doing so.

There have been two points raised. The first arises on the general construction of the covenant:—and the other on the pleas to the 2d breach.

On the first point it was contended, by the plaintiff in error, that the arrival of the ship, and her being ready to load 65 days previous to the sailing of the convoy, *was a condition precedent to every thing else which was to be done*; and that therefore, if the ship did not arrive, and was not so ready to load, the charter-party must be considered as at an end.

On the other hand it was argued, that that proviso had nothing to do with the breach, and that the

the plaintiff in error was bound, at all events, to load the vessel within a reasonable time.—(*His Lordship read the words of the covenant.*)—Now that proviso only applies to the obligation on the master to sail for *England* with the *June* convoy, if he should arrive 65 days before it should sail; but if he did not, then the general obligation to load still remained binding on him, although the ship should not have arrived out 65 days before the sailing of the *June* convoy. And that puts an end to the objection on the first breach, of the want of the necessary allegation of the arrival of the ship, and of her being ready to load; for we think that that part of the covenant is not a condition precedent to the general obligation to load, but that it has relation only to the time of the loading with respect to the ship's sailing.

The next objection is to the pleas to the second breach, complaining, that the ship having arrived out in time,) that is 65 days previous to the sailing of the convoy,) was not dispatched with a cargo. It was necessary to state that the ship had arrived, and we accordingly find that allegation in the breach. Then it is also stated that the plaintiff detained the vessel for a further space of time after the sailing of the convoy; and supposing she was not ready to depart on the sailing of the convoy, by reason of her not having been loaded, the damages would be to be measured by the time she had been delayed. But the substance of the breach is, that the plaintiff in error did not load the vessel in time to allow her to sail with the convoy. The further allegations in that breach relate only to the sort of damages to which

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which the defendant would be entitled. The detention is not the subject-matter of the action, for that is set out before; and therefore these pleas denying the detention only, are insufficient, because they do not go to the denial of the right of action.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(IN ERROR.)

1817.

8th May.

HARRISON v. KING.

These words, "I will take him to Bow-street on a charge of forgery," are not actionable, because they do not amount to charge the person of whom they are spoken with felony.

This Court will not reverse a judgment of the Courts below, merely on the ground of the defendant in error not appearing, without going into the errors assigned.

THE plaintiff below had recovered a verdict in the Court of King's Bench, in an action for words. The defendant (in error, an attorney) in his declaration stated, that the plaintiff (in error) in a certain conversation, held in the presence and hearing of a third person, (then and still being a client of the defendant,) falsely and maliciously spoke, &c. the false, scandalous, and defamatory words following: "I will take him to Bow-street upon a charge of forgery," (*inuendo*, that the defendant had been and was guilty of forgery.) The defendant (plaintiff below) had obtained a verdict, with entire damages (1,500*l.*) and judgment. One of the errors assigned was, that the words did not import

any

any express or precise imputation of the defendant having committed forgery, (it was not said for what purpose, or to what place there, or on what charge, or against whom it was to be preferred,) but only an intention of the plaintiff to take the defendant to Bow-street upon a charge of forgery: which words of themselves constituted no cause of action, although laid in a separate Court, as a separate cause of action, without any special damage.

[*Lawes, E.* for the plaintiff, moved, that the judgment might be reversed, no one appearing on the part of the defendant.

GIBBS, *C. J.*—We cannot reverse a judgment on that ground alone. Some reason must be shown.]

Lawes then stated the error assigned as above.

[GIBBS, *C. J.*—Have you looked into the cases of *Wood* v. *Merrick (a)*, and *Poland* v. *Mason (b)*, where it was held, that the words should affirm the plaintiff to be a felon; for that a mere assertion that the defendant charged him on suspicion of felony, is not of itself actionable.]

That was stated to be the precise objection intended to be made to the present judgment. On which the Court pronounced the

Judgment reversed.

(a) Ro. Abr. p. 73. pl. 21. l. 50.
(b) Hob. 305. 326.

IN THE EXCHEQUER CHAMBER.

(IN ERROR.)

1817.
Same Day.

STONE *v.* M'NAIR.

In an action of *assumpsit*, brought against a defendant for money lent to his wife, it must be alleged to have been lent at his request, or it will be insufficient; and that even after a judgment has been suffered by default.

Nor is it cured by a count for money lent to the defendant and his wife, at the request of him and his wife;—although it is stated in both counts that the husband promised to pay.

CHITTY stated,—that the judgment on which this writ of error was brought, had been suffered to pass by default on the whole declaration, which consisted of the common counts, in *assumpsit*:—that the objections arose on the 5th and 7th counts, which were for money lent to the defendant below and to his wife, at the request of him and his wife:—and for money paid for the use of the wife of the defendant below, at the request of the wife;—and in both counts it was stated, that the husband promised to pay. They were, 1st, That there was no allegation to show that the money had been lent to the defendant's wife at his request, or expended for her at the request of her husband. And, secondly, that there was no legal consideration precedent stated for the promise by the husband. Both these points were elaborately considered in the note of Mr. Serjeant *Williams* to the case of *Osborne* v. *Rogers (a)*, and the other authorities there cited. If it should not be considered that a request by the wife was insufficient to raise an *assumpsit* on the part of the husband, another

(a) Saund. 264, n. 1.

objection

objection would arise, that it was not stated. Nor did it sufficiently appear, that at the time of the supposed contract she was his wife; and if the debt was contracted before marriage, the husband could not be sued alone for it, *Mitchinson* v. *Hewson (b)*. And even if the debt were contracted after marriage, unless it appear that the credit was given to her husband, and not to her, he is not liable, *Bentley* v. *Griffin (c)*. The case of *Stephenson* v. *Hardy (d)* may be cited for the defendant; but that is distinguishable from this, because there there was an express allegation that the money was lent to the wife at the special instance and request of the husband.

Tindal, for the defendant in error, admitted that the declaration was not strictly technical; but contended, that after judgment by default, enough appeared on the pleadings to satisfy the Court that the judgment ought to stand. The fifth count was certainly the most difficult to support; but not as against the objection—that it does not appear that she was the wife of the defendant (in error) at the time of the contract, for that is most clearly expressed. In *Butcher* v. *Andrews (e)* it was held, that a man promising to repay money lent to a stranger, was not liable to an *indebitatus*, but to a special *assumpsit*; because the same money could not be lent to two. But that does not apply to the case of money lent to a wife, for which clearly the husband may be sued. So it was decided in

(b) 7 T. Rep. 348.
(c) 5 Taunt. 356.
(d) 3 Wils. 388.
(e) Salk. 23.

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Stephenson v. *Hardy*. There is nothing to exempt a husband *eo nomine* from liability for money lent to his wife and *non constat*, but she might have borrowed the money acting as the agent of her husband; or at least, a judgment having been suffered to go by default, may be considered as curing such an objection as the present, on the part of the husband.

GIBBS, *Chief Justice*.—Your difficulty, certainly, is the want of an averment that the money was lent to the wife at the request of the husband; and that omission is not to be got over.

BURROUGH, *J*.—There is another count for work and labour, also, which cannot be sustained.

Judgment reversed.

Saturday 10th May.

The KING *v.* RIDGE.

If the drawer of a bill of exchange (which has been accepted by the drawee) made payable to his own order, and endorsed by him, gets another person to procure cash for it, who does so by allowing more than the legal discount to be taken on it, it is usurious: for not being drawn for the benefit of such third person, but of the drawer himself, it is not a sale of the bill by such third person, but an advance of money by way of discount to the person making it, and on his credit.

Such a bill getting into the hands of the Crown, under an Extent against the party who discounted it, is equally invalid as if it were still in his possession.

A *SCIRE Facias* having issued against the defendant, as the acceptor of three several bills of exchange,

exchange, dated 12th *April* 1813, payable twelve months after date, drawn by the Earl of *Moira*, whereby he *(Ridge)* became indebted to *Austen* (the holder) in that sum and interest, as found by an Inquisition, under a commission on an Extent against him, as Receiver General for the county of *Oxford*,—the defendant pleaded a general traverse: and the case coming on to be tried before the *Lord Chief Baron*, at the sittings after *Trinity* Term, the jury found a verdict for the Crown.

In *Michaelmas* Term, *Clarke* obtained a rule to show cause why a verdict should not be entered for the defendant, or a new trial granted.

From the report of the evidence given on the trial, it appeared to have been proved, that a little before Lord *Moira*'s departure for *India*, his lordship had drawn four bills for 1,000*l.* each, payable to his own order twelve months after date, which were accepted by *Ridge*, his lordship's regimental agent. —That they were then handed over, endorsed by Lord *Moira* generally, to Major *James*, his lordship's confidential friend, and who had been employed in obtaining money for his lordship, through the medium of such bills, ever since the year 1802, by getting them discounted for that purpose, and often at the house of *Austen* and *Maunde*, but more particularly with *Austen*, who usually furnished cash for them.—That Major *James* (having previously had a communication with *Maunde* on the subject of getting the bills negociated,) took them himself to the banking-house of *Austen*, *Maunde*

 and

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The King v. Ridge.

and Co., in *Henrietta-street*; where, after several interviews with *Maunde*, (without seeing *Austen* on the business,) he at length received from *Maunde* 3,600 *l.* for the four bills, which he immediately gave to Lord *Moira*. Major *James* was known to *Austen* and Co. to be the agent of Lord *Moira*, and to be procuring the money for him. It was also in evidence, that Lord *Moira*'s bills, so drawn and accepted, had become much depreciated in the market; which was explained to mean, that they were not negociable for so much in value as they purported to be drawn for, and that 15 *l. per cent. per annum*, was commonly required and received for discounting them. Major *James* had himself no interest in the bills, but was merely the agent of Lord *Moira*; and had not endorsed them, nor was there any other endorsement on them but that of Lord *Moira*. On that evidence, the counsel for the defendant objected that the transaction was usurious; for that it was quite clear, that the money given for the bills in question, was in the way of discounting them for Lord *Moira*, and not as buying them of Major *James*. His lordship left it to the jury to say whether the transaction before them was merely colourable on the part of the house of *Austen* and *Maunde*, and was a discounting of the bills; or whether it was a fair and *bonâ fide* purchase of the bills by them. If the former, directing them to find for the defendant; if the latter, for the Crown: when the jury found a verdict for the Crown.

Dauncey, and *Nolan*, showed cause; contending, that what had been done in respect of the bills, was

was on the face of the transaction a mere sale, and not a discount: when the Court calling on the counsel who were to support the rule,—

Clarke, and *Peake*, submitted,—that the transaction was a discounting, and not a purchase of the bills, and therefore usurious;—that the money given for them was a personal advance to Lord *Moira* himself alone, on his credit, at a premium of 15 *l. per cent.* being considerably above the usual discount. Major *James* was not a third person holding the bill for his own benefit, as having received it for money due to him from Lord *Moira*, nor does he endorse it, or make himself liable;—if he had, it would have been a loan to him, and therefore equally usurious;—but he is identified with Lord *Moira*, who was at the time distressed for money, and was precisely one of the persons meant to be protected by the statute *(a)* against the mischievous consequences of their necessities, and the language of the act is most general: or if transactions of this sort may be legalized as a sale, the beneficial provisions of that act will be frustrated. A party selling a bill is released from all responsibility on it. Not so here, Lord *Moira*: whose sale it was, if the bill was sold, for it was sold for his benefit, and in fact by himself; for the mere agency of a third person can make no sort of difference in the act itself, which was, a discounting of these bills at more than five *per cent.*

Dauncey, and *Nolan*, *contrà*, contended, that

(a) 12 Anne, cap. 16.

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it was a mere question of fact for the jury, whether this was a sale by Major *James*, or a discounting for Lord *Moira*; and their finding ought to be conclusive. It was in evidence that no one would take these bills for their full amount, therefore they were sent into the market to be sold to any one who would purchase them on speculation. They had in the market a specific value assigned them, and the house of *Austen* and Co. had given for them all that they were considered to be worth. This is an instrument on which any one, becoming legally possessed of it, might sue, and therefore may be the subject-matter of sale. If the issue of the bill was fair at first, subsequent usury does not vitiate it. If *Austen* and *Maunde* had endorsed these bills over to a third person, they would have been available in his hands; so also are they in the hands of the Crown.

RICHARDS, *Chief Baron.*—This is certainly a case of very singular circumstances.—*(Stating the transaction and the connection between the parties, and observing particularly on the communication between* James *and* Maunde, *before the bills were produced.)*—It is said that this transaction was usurious; and if it were, we are bound here to decide according to the law.

Now I confess, on re-consideration, that I think this was an usurious transaction, and that the usury affects the Crown in the same manner as it would the assignees of *Austen* and *Maunde*, if they had become bankrupt. Without entering into all the circumstances, the simple fact is, that Lord *Moira* and

and Major *James* were, as to this transaction, one and the same person. If Lord *Moira* had gone to *Austen* and *Maunde*, and said, "Lend me 3,400*l.* and I will give you bills for 4,000*l.*" no doubt that would have invalidated the bills; and I do not see how we can distinguish between the facts of the bills being signed before or after the negociation, or whether they were taken to *Austen* and *Maunde* in an issuable state or not. Major *James* does not affect to be more than a mere messenger in the business. It was argued, that if the bills were good in their inception, subsequent usury would not make them bad. I think, however, that it would. Then it was contended, that in the hands of the Crown, as of an innocent holder, the vice of the bills was removed; but I think that the Crown must stand in the place of an assignee, and I think it is clear, that in case of bankruptcy an assignee could not have recovered on the bills; and I see no difference, for they both become possessed by act of law.

It has been put also, that the question was fairly left to the jury as a question of fact, whether this negociation was a loan or a sale; they being told that in the one case the bills would be bad: in the other they would be good. The effect of that direction would be, to leave the question of law to them. Now I think that the person who tried this cause ought to have told the jury, that under the circumstances of this case the transaction was usurious. It did not occur to me then, as it does now, that this negociation was tainted with usury; but

 I should

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I should certainly now direct, if the cause were trying before me, that Lord *Moira* could not be sued on these bills, because they are bad in point of law; and therefore I think there should be a new trial.

Graham, *Baron.*—The arguments of the defendant's counsel have relieved me from many considerable difficulties; and I think the question was, ultimately, not one of fact. If Major *James* had received these bills from Lord *Moira* on his own account, as security for a debt, and had then sold them, the direction would have been right; but *James* was Lord *Moira*'s confidential agent.—*(Adverts to the evidence.)*—This, therefore, being clearly a loan to Lord *Moira*, and not a purchase in the market, it was not a question for the jury; and the Judge should have told them, that it was a transaction which the law did not allow. Then the bills getting into the hands of the Crown, under this extent against its debtor, does not remove the usurious quality; for that is certainly a very different thing from a bill originally good having got into the possession of a *bonâ fide* holder for a valuable consideration.

Wood, *Baron*, absent.

Garrow, *Baron.*—The confusion which has got into this case proceeds from its having been at one time considered, that these bills were sent about the town to be sold for what could be got for them; but the fact is, that this paper was sent by the maker

maker to those who well knew its precise value, to get that value for it, which was done. Nothing had been given by Major *James* for it; and whether the transaction was originally good, it is not necessary to inquire: but that this transaction, as between Major *James*, the acknowledged agent of Lord *Moira*, and *Austen* and *Maunde*, was usurious, there can be no doubt.

It was ingeniously argued, that the bills, by getting into the hands of the Crown, made a difference as between the Crown and the party: but it would be most unfortunate if that were so; for then the grossest usurer would have nothing to do but to get his bills seized under an extent, and then all his illegal transactions would be rendered available in the hands of the Crown. That is too monstrous a proposition for serious consideration, and would require to be supported by undoubted authority.

Per Curiam.

Rule absolute.

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Monday 12th May.

After payment of money into Court by a defendant, in an action brought against him on the 2d and 3d Edw. VI. by a farmer of tithes, he cannot object to the plaintiff's title to the tithes; because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages.

BROADHURST, Clerk, *v.* BALDWIN.

THE plaintiff had recovered a verdict at the last *Suffolk Lent* Assizes, in an action of debt under the 2d and 3d *Edward* VI. cap. 13, for treble the value of tithes of corn and grain taken and carried away by the defendant without setting out the tithe.

The declaration contained six counts.—The first count (under the statute) stated plaintiff to be entitled to the tithes, in the parish of *Brandleston*, as the farmer thereof; and that the defendant, as an occupier of land within, &c. having cut down and reaped certain corn and grain, to wit, &c. the tithe whereof did of right belong, &c. and ought to have been yielded, &c.; but defendant, not regarding, &c. did take and carry away the said corn and grain from said land where the same had so grown, without dividing or setting forth for the tithe thereof, the tenth part of the said corn and grain from the other nine parts thereof, and without any agreement or composition, &c. value 100*l.*; whereby, &c. *actio accrevit* for 300*l.* being, &c.—The 2d count stated, that defendant was indebted to plaintiff 100*l.* for the use, perception, and enjoyment of the tithes of corn and grain of certain lands by defendant, at his request, and by the permission and sufferance of the said plaintiff, for a long time then elapsed, perceived, and enjoyed, which, &c.; whereby, &c.—

The

The 3d count, that in consideration of defendant's perception and enjoyment of divers other tithes, &c. the defendant undertook and agreed, &c. *quantum valebant*, viz. 100*l.*—The 4th and 5th, the common money counts.—6th, Account stated; breach; damage 10*l.*

The defendant paid 22*l.* into Court on the 2d, 3d and last counts, and pleaded the general issue.

The plaintiff, on the trial, proved that he was lessee of these tithes under trustees, and that he had received payments from other occupiers. The defendant had been accustomed to pay a certain yearly composition for his great tithes to a former lessee; and one of the questions in the cause was, whether that composition had been put an end to, and whether the plaintiff, the present lessee, was entitled to recover more.

The defendant's counsel objected, that the plaintiff had not made out a sufficient title to the tithes to enable him to support the present action; for that there could not legally be a lease of tithes by parol without deed.

On the other hand it was contended, that the defendant having paid money into Court, had admitted the plaintiff's title; and could not, therefore, afterwards take any objection to it.

GRAHAM, *Baron*, who tried the cause, ruled, that the plaintiff had made out a right to the tithes for

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for one year at least, by his contract, fortified by perception under it; and observed, that that title was admitted on the record, and more particularly as the counts on which the money was paid into Court were special: but that as to the count for treble value, that was out of the question; because it was clear that the plaintiff had never called on the defendant to set out the tithes, and that he never meant to do so.

Hart obtained a rule to shew cause why the verdict should not be set aside and entered for the defendant, or a new trial granted, on the objection taken at the trial now supported by the authorities;—he submitted, that the plaintiff, having declared as farmer of the tithes, was bound to produce a lease; for that there could be no transfer of tithes to a stranger by parol, whatever there might be as between the person entitled and the person who was to pay them by way of retainer, *Hawke* v. *Brayfield*, *(a)*, *Keddington* v. *Bridgman (b)*.—That in the latter case it was held that such an agreement operated by way of forbearance and waiver, as between persons who were privy to the original compact; but in no case could it apply to a third person or stranger.

As to the objection of their being precluded from going into the title of the plaintiff after paying money into Court, they relied on the distinction

(a) Cro. Jac. 137.

(b) Bunb. 2. and cases in the margin.

taken

taken by *Ashurst*, J. in *Cox* v. *Parry* (c), that it was only an admission that the plaintiff was entitled to maintain his action for the amount of the sum paid in; leaving all points open as to any further demand, as if the plaintiff had discontinued and proceeded *de novo*.

Blosset, Serj^t^, and *Storks*, now showed cause; submitting, that the plaintiff had proved a sufficient title, independently of the admission by payment of money into Court; and if not, that the defendant was precluded thereby from taking the objection.

As to the objection itself, they contended, that although there were cases apparently somewhat contradictory as to the right mode of acquiring a title to tithes, and raising a doubt whether a lease of them for a year, as an incorporeal hereditament, could be by parol; yet it had been held that such a transfer, if not good as a lease, was good as a mutual agreement (d), and that would be sufficient to sustain this verdict, if accompanied by enjoyment. In *Selwin* v. *Baldy* (e), it was held sufficient, on the part of a plaintiff declaring as farmer, that he proved himself to have been in receipt of tithes as lessee of *J. S.*, who was lessee of the rector, without producing the lease from the rector to *J. S.* And in *Hartridge* v. *Gibbs* (f) it

(c) 1 T. R. 464.

(d) Eaton v. Sherwin, Skin. 113.

(e) B. N. P. 188, and Nelson v. Woodward, Cro. Eliz. 249; Owen, 103; 1 Brownlow, 354; and Sorrell v. Grove, 1 Ro. R. 174.

(f) B. N. P. 188.

was

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was not required of the plaintiff, who declared as farmer, to produce any lease after proving perception; and that would be sufficient to entitle a plaintiff to call on a defendant to make out his case (g). And they cited also *Saunders* v. *Sandford* (h), *Arnold* v. *Bidgood* (i), and *Moyle* v. *Ewer* (k).

On the other point they submitted, that the case of *Cox* v. *Parry* was against the proposition in support of which it was cited. And they cited further, the case of *Bennett* v. *Francis* (l), where the Court of Common Pleas expressly held, that payment of money into Court on a declaration in contract, was an admission of the contract, to the full extent of the terms laid in the declaration. This also is laid as a special contract, and is equally admitted by the payment of money into Court; and the question was reduced to one of the amount of damages, and the jury found that the plaintiff was entitled to more than had been so paid in by the defendant. They also cited, to the same point, *Yates* v. *Willan* (m).

Hart, B. and *Jamieson*, in support of the rule, contended, that payment of money into Court did not merely confine the question in this cause to the amount of the ulterior damages to be recovered; but that it still left the right of action open to any objection, and did not preclude the defendant from the benefit of any thing which should occur on the

(g) B. N. P. 188.
(h) Cro. Jac. 437.
(i) Cro. Jac. 318.
(k) Ib. 362.
(l) 2 B. & P. 550.
(m) 2 East. 128.

trial

trial destructive of the plaintiff's case: as if, in an action by one of several partners for a partnership debt, the defendant, having paid money into Court, and not having pleaded in abatement, might still take advantage of the plaintiff's showing himself out of Court, by betraying, in the course of the cause, that there were other persons who ought to have been joined with him in the action. A defendant might pay money into Court on other grounds than that of admission of the plaintiff's right even so far; and it would be hard to say that if a defendant should erroneously pay money into Court, that should give a plaintiff a right to proceed in a suit for which he had originally no foundation. And he cited *Hutton* v. *Bolton* (*n*).

GRAHAM, *Baron*.—I am of opinion that the plaintiff is not entitled to any further inquiry; though, if my brother GARROW should think otherwise, I shall concede my opinion. I must observe, however, that the case which has been cited for the defendant, of *Cox* v. *Parry*, in my view of it, is precisely against the proposition that the payment of money into Court on a declaration, upon a special contract, is not conclusive on the defendant. The defendant, in that case, was precluded from admission of the plaintiff's right of action, because he could not admit such a right against the positive effect of an act of parliament; or that the plaintiffs were entitled to proceed on a policy against one whose name was not inserted in the instrument, as was

(*n*) 1 H. Bl. 499.

required

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required by the 25th *Geo.* III. c. 44. And in the case of *Hutton* v. *Bolton*, the defendant did not wish to contest his liability as to the 21 *l.*; yet he admitted nothing by paying that money into Court, but denied that any thing more was recoverable. In this case, where the declaration was special, the money which was paid into Court was an acknowledgment of the specialties of that declaration, and was an admission of the plaintiff's right to sue; and that something, at least, was due to him from the defendant.

WOOD, *Baron*, absent.

GARROW, *Baron*. I entirely concur in the opinion which has been given. It appears to be admitted that the verdict was right, if the payment of money into Court was an admission of the plaintiff's right of action. Now the parties could only have gone on to trial afterwards, to ascertain whether there was or was not any thing more due to the plaintiff than the sum so paid into Court; and if not, there could have been nothing to try. In so doing they proceeded at their peril, and must abide by the result. The prudence of paying money into Court, is one of the most anxious points on which counsel can be asked to advise; between the care lest the party should admit the terms of a special contract, on the one hand; or on the other, lest he should proceed with a consciousness that something must ultimately be recovered: but, whatever course be adopted, it must be followed by all its legal consequences. In the present case the Jury have found that more than the sum paid in by the defendant was due to the plaintiff; and there has been no good ground urged for any further inquiry.

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As to the other question, it is unnecessary to decide that point; but I should certainly say, that the tithes might have been so let to the plaintiff, as it has been alleged they were, for a year. The verdict, therefore, must stand.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

(In Equity, *Coram* RICHARDS, Lord Chief Baron.)

1 Wil 4 402

The WARDEN and MINOR CANONS of ST. PAUL'S, and their LESSEE, *v.* the BISHOP of LINCOLN, as DEAN of ST. PAUL'S.

4 Hare 170

Tuesday, 13th May.

The dwelling-house, &c. of the deanery of *St. Paul's*

THIS was a suit instituted for an account and payment of tithes, after the rate of 2*s.* 9*d.* in the

in *London*, is not exempt from the payment of tithes to the Warden and Minor Canons under the 37 *H.* VIII. c. 12.

The rate, according to the amount of which, the payment for such tithes is to be computed, is 2*s.* 9*d.* in the pound, on the fair yearly rent, or actual annual value of the premises to be let, as in the case of all other houses paying tithes.

The maxim *ecclesia ecclesiæ decimas solvere non debet*, does not apply to the circumstances under which the dean of St. Paul's is connected with the warden and minor canons as parson of St. Gregory. It is confined to the clergy of the *same church*.

The dean is not, within the meaning of the exemption in the act, a great man.

Where there has been no new lease granted for many years, the clergy of *London* are to be paid for their tithes, on the expiration of the old one, according to the improved annual value; and when any fine is paid on taking a new lease, in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value.—New houses on old sites are liable according to the actual annual value.

Where a general act of parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law: *expressio unius est exclusio alterius.*

pound,

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pound, for the dwelling-house, &c. in the occupation of the defendant, computed on the full value, to be let by the year. The bill stated, (after deducing the title of the plaintiffs, as parson and proprietors of the church of *St. Gregory*, to the tithes, as conferred on them by appropriation of the Dean and Chapter of the cathedral church of *St. Paul's*, under the authority of letters patent of the 24th *Hen.* VI.)—That by a decree *(a)* dated 23d *February* 1545, made in pursuance of the act of parliament (37 *Hen.* VIII.) "for tithes in *London*," it was ordained, that the citizens and inhabitants should yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars and curates for the time being, after the rate therein mentioned; *viz.* for every ten shillings rent by the year, of all houses, shops, &c. 1*s.* 4$\frac{1}{2}$*d.*;—twenty shillings, 2*s.* 9*d.*; and so in proportion for every 10*s.* increase of rent, payable quarterly, with an exception in favour of any houses, &c. *accustomed* to pay less.—Then (noticing the acts of 22d *Cha.* II. for rebuilding the city of *London*, as having united other parishes with *St. Gregory*, and the 22d and 23d *Cha.* II. as confirming the right of the plaintiffs to their tithes as formerly,)—it charged the possession of the defendant, and his non-payment of tithes, and that the said dwelling house, &c. ought to be computed, with respect to the tithes payable therefore, at thepresent improved yearly rent or value.—And prayed, &c.

The defendant, by his answer, having premised that

(a) This decree is set out at length in 3. Burn's Ecclesiastical Law, p. 555.

in

in 1670 the then Dean rebuilt the mansion-house, &c. on part of the scite of the old deanery, as set out by an adjudication under the hands and seals of the then Lord Keeper and Bishop of *London*, under the authority of an act of parliament, on consideration of being entitled to demise the residue for a term of 60 years, set up the following defences:

1st, That from time whereof, &c. no tithes, or any pecuniary payments whatsoever in the nature or in lieu of tithes, were ever made and paid, or were of right due or payable to the plaintiffs, for or in respect of the said deanery-house, &c. so long as the same remained in tenure and occupation of the Dean, (stating his own constant occupation, and that the said deanery consisted of the same premises so set out, &c.;) but that such part of the garden of the present deanery as thereinafter mentioned, formerly belonged to a certain dwelling-house or tavern called *The Feathers*, and which the defendant believed was added to the old garden soon after the rebuilding of the deanery; and that part of the present court-yard and garden of the said deanery consisted of the former sites of four shops or sheds, and of three houses in *Scollop-court*, added at the same time.

2dly, Reciting the purchase and conveyance of the scite of the *Feathers*, in 1683, which was added to the garden of the deanery,—the answer stated, that from that time down to the year 1779, the sum of 12*s.* 6*d.* had been paid by the defendant's predecessors to the plaintiffs, in lieu of tithes for the said ground; and submitted, that such annual payment

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ment could not now be increased. It then referred to certain entries in the plaintiffs' book, where the payment of 12*s.* 6*d.* was described as being paid for the tithes of '*the deanery*,' but which, it insisted, were payable only for that part of the garden added in 1683; and therefore protested against such entries concluding the defendant. It then stated,—that shortly after the year 1769, the tithes due to plaintiffs, of four shops or sheds adjoining and occupied with the said deanery, were first charged and collected after the rate of 1*s.* 4*d.* per annum for each, making, together with the 12*s.* 6*d.* the entire sum of 17*s.* 10*d.*;—that in 1776, the tithes due for three houses in *Godlop-court*, also taken into the occupation of the then Dean, were first charged and collected after the rate of 2*s.* for each house, making, with the other sums, 1*l.* 3*s.* 10*d.* which was also paid down to 1779; from which period down to 1792, it was alleged, that from mistake or accident, a sum of 1*l.* 5*s.* had been improperly collected on behalf of the plaintiffs, instead of the said sum of 12*s.* 6*d*;—and insisted, that the Deans of the said church were entitled to hold the premises which were part of the scite of the ancient deanery, free of all tithes, and payments in lieu thereof.

3dly. The answer next (adverting to that part of the decree which orders that the owners of dwelling-houses, &c. inhabiting or occupying the same themselves, should pay a rate of tithes proportionable only to the quantity of such yearly rent as the same *were last letten for,*) insisted, that from long previous to the year 1779, the payment of 12*s.* 6*d.* for

for the scite of the *Feathers*, added to the deanery, and the other sums before-mentioned, for the other additions, was the only sum ever paid in respect of the said premises, (except the sum of 1 *l.* 5 *s.* paid from 1779 to 1792, instead of the 12 *s.* 6 *d.* by mistake;)—and that none of such premises, so added, had ever been letten since they were added to the deanery;—and that as the said premises must be presumed to have been then assessed at the rent for which they were then last letten, they could not, therefore, be raised till they should be next letten.

4thly. The defendant (adverting to the words of the statute, that the dues should not extend to the houses of great men, or noblemen, or noble-women, when in their own hands,) submitted,—that the Dean was a great man, within the meaning of the act, and that therefore the ancient site of the deanery was exempt; or, if not, that still the customary payment of the sum of 12 *s.* 6 *d.*, assessed upon the said deanery, was the only payment to which it was liable for the said ancient site of the deanery, including the site of the *Feathers*, unless it should he again let.

The 5th, and last ground of defence, was, (insisting still on the annual payments,)—that, in all events, the plaintiffs were not entitled to demand more than 1 *l.* 5 *s.* for the said deanery, exclusive of the additions;—and that, if they were, they were not entitled to more than for six years before the filing of this bill.

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The answer concluded, by denying that any improvements had been made since the re-building, &c.; and that defendant had not, (as was charged,) any other documents in his possession, except as set forth in his schedule.

Wetherell, and *Hall*, for the plaintiffs, contended, that they were entitled to an account of the tithes, at a rate according to the present annual value of the premises subject thereto, to be let. And they submitted, that the decided cases of the *Minor Canons of St. Paul's* v. *Morris (a)*, and *Antrobus* v. *The East India Company (b)*, had furnished the principle which ought to govern the present;—that the plaintiffs having once proved by evidence, that a sum of money had been always paid for the tithes of these premises, the only defence on which the defendant could succeed would be, that that sum was a customary payment;—and they submitted, that that customary payment, if pleaded, should be stated with the same precision as is required in pleading a *modus:* but no such defence (they observed) was set up by the defendant's answer; or if it were, that it could not be noticed by the Court, because it was not well pleaded. But there are other defences set up, clashing with, and contradictory to each other. One is, that the sum of 12*s.* 6*d.*, which has been paid for the tithes, has been paid for other premises added to the deanery: whereby they would put it, that the *corpus* of the deanery has never paid tithes; suggesting rather than insisting on a defence on that ground. But if that sum

(a) 9 Ves. 155. (b) 13 Ves. 9.

should

should be proved to have been paid, and payable, for the deanery, the defendant must get rid of it by showing it to be a customary payment; and it was at least doubtful, whether a customary payment would be good for a single house in a parish. The object of the statute was, to put the tithes payable to the clergy in *London*, on a footing with the predial tithes paid to a rector in other cases. There is no exemption in the statute in favour of the defendant, and all intended exemptions are expressly provided for therein. The deanery of *St. Paul's* cannot be said to be within the exemption in the 16th section of the act, as the house of a great man. It is clear, that he is not a nobleman; and the expression great men, *(magnates,)* taking precedence of noblemen in the order of the words, must have been used as with reference to persons of even greater popular consequence than noblemen. But a Dean (although the present Dean be a great man) was not then, nor is now, *as Dean*, a great man in point of right, whatever the courtesy of society may consider him. A dean is not mentioned in the 2d *Rich.* II. cap. 5, *(de scan. mag.)* or in the 31 *Hen.* VIII. c. 10; nor is there any notice taken of a dean, in the table of precedence in *Blackstone's Commentaries*, (p. 405.) And as to all other common-law grounds of exemption, ecclesiastical or otherwise, this statute has virtually excluded them: and even an abbey would be liable to pay tithes under this act of parliament. So it was held in the case of *Green* v. *Piper (c)*. They then adverted to the fact of the payment of 12*s.* 6*d.* for

(c) Gw. 164.—Cro. Eliz. 276.

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the deanery, and to the circumstance of its having been doubled of late years; submitting, that the less sum, even, was much too large a payment to be attributable to the small spot of ground on which the *Feathers* had stood;—that its having been increased destroyed the defence of a customary payment altogether;—and that if the deanery itself was not protected, the new building was liable to pay tithes according to its improved value. That was decided by the case of *Williamson* v. *Gosling (d)*. And they contended, that that value was not to be estimated merely by the rent paid, but by the actual yearly value, or what it would now be fairly worth to be let by the year: and they cited *Ivatt* v. *Warren (e)*, and *Antrobus* v. *The East India Company (f)*.

Dauncey, and *Spranger*, for the defendant, contended,—that the payment of tithes for the city of *London*, was merely intended to be a charge on *lay property* of a nature purely *religious*; and that they had always been paid as such on the vigils of feasts, to the clergy, and so paid by the laity only; —that the clergy had never been considered liable to those payments;—that they were, for that reason, not named in the act of the 31 *Hen.* VIII. which mentioned only the *citizens* and *inhabitants*, and therefore the provision must be construed as confined to the laity alone, as the payment itself had always been before the passing of the act;—that the 12*s.* 6*d.* (the earliest payment of which was in 1763) was a payment in respect of the *Feathers* (which had been a house used as a tavern,) having been purchased and

(d) Moor, 912.
(e) 3 Gw. 902.
(f) 3 Gw. 1054

added

added to the deanery, and therefore previously liable to pay tithes, and thus a legal origin was shown as to that payment, which must destroy the presumption of an illegal one. With respect to the entry of the payment, as for "the deanery," they submitted, that it was not surprising that, by way of brevity, a payment for any *part* of the deanery should be entered shortly in the *plaintiffs'* books as a payment for the deanery generally, and not for the precise part only which was liable in point of fact;—an entry, besides, which the defendant's predecessors could have had no opportunity of knowing, still less of objecting to. The subsequent increase of the amount, they contended, was attributable solely to accident and inadvertence; and certainly no reason is given for it by those who claim it.

As to the argument that the defendant could not bring himself within any of the exemptions in the act, they urged, that his claim was not founded on an *exemption*, by way of *discharge*, from payment of tithe *at any time due*, but on the ground that the premises *never had been chargeable*.—They urged that it was an established maxim, that *ecclesia ecclesiæ decimas solvere non debet*; and they cited for that *Blinco* v. *Marston (g)*, and *Blinco* v. *Barksdale (h)*. And as to any doubt which might be raised of the deanery being built on the ancient site, that must be out of the question, because it is expressly so charged by the plaintiff's bill.

(g) Cro. Eliz. 479. (h) Ib. 578.—Gw. 197.

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[RICHARDS, *Chief Baron.*—The maxim of *ecclesia decimas non, &c.* is not so general as to extend to ecclesiastical persons not belonging to the same church.]

But these premises, (it was submitted,) are church land, and are holden by this ecclesiastical person in respect of his deanery, which is within the parish.

It was then contended, that if the defendant was not to be considered exempt from the payment of tithes as an ecclesiastical person, he was within the express exemption of this act as a great man, according to the meaning of those words, which were clearly contra-distinguished from noblemen, and must be applied to persons of wealth and consequence, or dignity, who were not ennobled. Of that description was the Dean of *St. Paul's*. A dean is styled in *Burn's Eccles. Law (i)*, "a governor over the prebendaries and canons:" he is therefore a *great* man in *the church*, and as such he no doubt was in the contemplation of the legislature, when passing this act. The meaning of the term greatness, is still further elucidated by the subsequent words of the exemption, including therein persons who were *great in trade*, as all companies having halls, &c. (who could have had no assigned rank,) which is strongly conclusive of the intention of the framers of this act.

They ultimately contended, that in all events, the payment, if chargeable, ought to be restricted to the amount hitherto paid.

(i) Vol. 2. p. 76.

Wetherell,

Wetherell, in reply, submitted,—that the first ground of exemption from payment of tithes, was wholly unsupported by evidence;—and that this statute had precluded all presumption of satisfaction by payment to a third person. He denied that the payments were of a religious nature; insisting that they were merely civil, and to be considered as predial tithes; not as offerings on the altar, or for prayers, or in any way connected with the rites of religion; and therefore did not come within the ecclesiastical exemption, which was confined to the case of a rector and vicar of the same parish; and such was the result of the cases of *Blinco* v. *Marston*, and *Blinco* v. *Barksdale*,—that tithes in *London* were a civil right to a civil payment, in respect of the houses, and not in respect of the persons occupying them, as offerings at festivals are; and therefore, even if before the act a clergyman was not liable to pay tithes, he became liable as soon as the act passed. And he repeated, that the Dean could not be considered as a great man, within the words of the statute; and concluded with submitting, that the payment proved, of the two sums of money for the deanery, had not been explained, or the arguments deducible from it answered.

RICHARDS, *Chief Baron*, now delivered judgment.—(*Having adverted to the nature of the suit, as founded on the statute of* 31 Hen. VIII. c. 10.)

It is admitted (said his Lordship) that that statute is general, and that it gives the parson a right to tithes for every house in the parish not expressly excepted.

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excepted. It is therefore incumbent on the person disputing the plaintiff's claim to tithes, to show either that he comes within some exemption in the statute ;—or that he is protected by some customary payment. It is admitted that the deanery of *St. Paul's* is within the parish of *St. Gregory*; and it follows, therefore, that the dwelling-house of the deanery is titheable, unless some legal exemption can be shown.

The defences which have been set up to this bill are several, and for the most part inconsistent.

The first defence is independent of the statute, and is founded solely on general non-payment of tithes. It appears that the parsonage of the church of *St. Gregory* was once in the patronage of the dean and chapter of *St. Paul's*, and that it was by them appropriated to the use of the warden and minor canons of *St. Paul's*, under the authority conferred on them by King *Henry* VI. And that former connection between them was pressed, as argument that a presumption might fairly be raised that by some contract then entered into between them, the dean might have stipulated for a discharge from the payment of tithes, in consideration of the benefice so granted; but no trace has been shown of the existence of such a contract, and therefore that defence fails: so that the dean must be considered, in that respect, as if he were any other person.

The next defence is also independent of the statute. It is, that the defendant is an ecclesiastical

siastical person, and that the deanery being part of his possessions as such, he is protected from the payment of tithes by the maxim that *Ecclesia ecclesiæ decimas solvere non debet.* But the answer to that is, that here, there is an express act of parliament *charging every house generally* in the parish, *except* certain houses which are *expressly* exempted; and that view of the act of parliament was acted on in a very early case,—*Green* v. *Piper (k)*,—where a house in *London*, which was part of the possessions of a priory, was held chargeable with tithes, according to the ordinance there, because only noblemen's houses are excepted. Giving full weight, therefore, to all the circumstances as yet relied on by the answer of the defendant, *the act of parliament not having expressly discharged him*, the dean is liable, notwithstanding, to the payment of tithes. It might be matter of curiosity, but it can be of no use, since the statute, in the elucidation of the present question, to inquire how tithes were payable before the passing of that act of parliament, which is the *Magna Charta* of the clergy of *London*; or what privileges ecclesiastical persons previously enjoyed: but the maxim of *ecclesia decimas solvere ecclesiæ non debet* having been said to apply here, I am called upon to give it as my opinion that this case is clearly not within the general application of that maxim, which, as I take it, merely applies to the case of a rector and vicar of the same church and parish, where the *ecclesia* would be paying tithes to itself;—as, where the rector or vicar is in possession of glebe, neither shall pay tithe to the other in respect of such

(k) Cro. Eliz. 276.

occupatio

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occupation. In other cases of an ecclesiastical person claiming exemption, he must prescribe in *non decimando*. The case of *Blinco* v. *Barksdale* (l) was that of a rector and vicar of the same parsonage; and of the same nature are all the other authorities. In *Watson's* Clergyman (p. 513,) it is said, "though glebe land, in itself considered, be all titheable as other lands be, yet that no tithes shall be paid of the glebe by the parson of a church to the vicar of the same church, whilst they are in the hands of the parson himself;" and that is the true rule. But there is no doubt, that when the glebe of one clergyman is in the parish of another, it must pay tithe; for that sort of privilege is confined to the clergy of the same parish. But that question cannot arise here, as I have before intimated, because the maxim itself, even if it had applied, is contravened by the express words of an act of parliament containing distinct exemptions, the introduction of which is necessarily exclusive of all other independent extrinsic exceptions. There is also another answer to be given to it, arising out of the pleadings and proofs, which is quite decisive; for this is a claim of a total exemption, (as it must be if the deanery be exempted at all,) whereas it is clearly in evidence, and it is admitted, that tithes have been paid in respect of the deanery. So much for the defences which are independent of the statute.

Then a defence is set up, gounded on an exemption by the terms of the statute, which, if made out, would dispose of the question. It is founded on the provisions

(l) Cro. Eliz. 578.

of

of the 156th section, exempting the houses of great men.—(*His Lordship read the section.*)—In the first place, to support that defence by evidence, it would be necessary to prove that no tithes had ever been paid by the defendant's predecessors formerly: but the contrary is actually in evidence. And besides, another point must be made out to support that defence,—that the dean is a great man within the meaning of the act. No case has been found as to the precise meaning of those words, or the extent of their application, but all the instances of exemption on that ground which can be furnished are instances of noblemen; and I incline to think with Mr. *Hall*, that the order of the words (which is, by the rules of grammar, a criterion of construction) imports, that great men must mean persons superior, in certain respects, to noblemen and noble-women, of which description there are certainly persons in this country. These are the only three classes of persons whose houses or buildings are exempt from tithes, in respect of the occupiers, by the act,—great men,—noblemen, and noble-women, (and it was no uncommon thing for the nobility to reside in the city in those days,)—and (in favour of commerce)—corporations, crafts, or companies, who have halls. Now, this defendant is certainly not one of either class of those privileged persons.

Thus the two first grounds of defence insisted on are quite independent of the act of parliament,—that the defendant is exempt from payment of tithes, and (he says) that accordingly none have ever been paid for the deanery. Then he sets up a defence of

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of total exemption under the act; and afterwards, again abandoning that ground, he pleads that he has always paid a sum certain, and therefore he is within the provision of the act, which directs the assessment to be made on the rent at which the premises were then last letten. Each of those defences are severally thus met by the evidence:—On the ground of exemption from non-payment raising presumption of a contract, he fails; for it is quite clear that he has, in point of fact, paid tithes. The same objection is opposed to his claim, either as an ecclesiastical person without the statute, or as a great man within it. Whether or not he may have paid tithes in his own wrong, is a question on which there is no evidence; but as far as the evidence given goes, the defendant and his predecessors have constantly paid tithes in respect of the deanery, and *as* for the deanery expressly in terms, independent of the other payments for what has been separately charged, and that for a great length of time. And what is still more extraordinary, as opposed to the argument of a customary payment, the sum which has been proved to have been paid in respect of the deanery has in later times been doubled; and therefore there is no fixed payment to which we can refer. I ought to notice the suggestion, that the 12*s.* 6*d.* was paid for the scite of the *Feathers* public-house, which was bought, and added to the deanery. The answer to that is, that it is not supported by evidence; on the contrary, the evidence is, that it has been paid for the deanery as '*the deanery*,' (and it is so charged in the old rate-book;)—and that that part

part of the premises forms only a very small part of the garden, and yet the payment for the tithes of it (before comparatively large) is in after-times doubled: that, therefore, must come under the effect of the objection founded on the evidence offered to prove that that payment for tithes has always been made in respect of the deanery.

Then we come to the question, whether the dean is to pay tithes now? It is candidly stated, that the defendant does not rely on a customary payment. There has been, in fact, no total exemption in his favour, on any ground, proved: on the contrary, 12*s.* 6*d.* has been for a very long time paid, and then that payment is doubled. It is clear, therefore, that he is liable to some payment.

Then the next question to be considered is, whether that sum so doubled, of 1*l.* 5*s.*, is to be the fixed rate of satisfaction for the tithes payable to the plaintiffs as parson, or whether it is to be proportioned to the improved value? I see no ground for so restraining the plaintiffs. The object of the statute was to give them the tithes according to the rent or full yearly value. If the premises are fairly leased (and it is to be presumed that they are, because landlords take as much rent as they can get upon their leases,) the minor canons take 2*s.* 9*d.* in the pound upon that rent. In the present case there has been no letting at all, and therefore there is no practical standard, either of rent or value, to which the payment of 12*s.* 6*d.* is referrible as a criterion for determining the due rate of tithes: nor can it be considered as being in effect a customary payment under a per-

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petual agreement; for it is proved that that payment was considered to be too small, and therefore it was increased to double the amount; and we find, in consequence, that 1 *l.* 5 *s.* was afterwards demanded and paid. Now it is quite clear that the object of this act of parliament was, that the rectors of *London* should have the same advantages as are enjoyed by rectors in the country. The 20th section—*(which his Lordship read,)*—gives a privilege, to any person taking a tenement at a less rent than had been accustomed to be paid for it, by reason of any misfortune, to pay tithes only after the rate of the rent reserved in his lease, *as long as the same should endure*; so that that clause is only binding till the end of the lease, and at that time, if the value of the property be advanced, either by the improvement of the premises or by the depreciation of money, then the clergyman is to be paid his tithes according to the improved value. Were it otherwise, indeed, if a proprietor should not let his premises at all, the clergyman would lose his tithes.

On the whole, this appears to me to be a case coming within the principle of all the decisions which have proceeded upon this act of parliament. In the case of *Ivatt* v. *Warren (m)*, the Court held the meaning of the act of parliament to be, that the inhabitants within the city and liberties of *London* should pay tithes after the rate of 2 *s.* 9 *d.* in the pound, according to the true value, "as "the same were worth to be letten *per annum*; "and that if the same had been a shed, as was pre-"tended, yet ought the same to be discharged of

(m) 3 Gw. 1057.

"tithes

"tithes no longer than it was continued a shed; for, "being converted into a dwelling-house, the same "ought to pay tithes according to the true value." In that case, too, fines paid on leases, whereby the rent was diminished, were not considered as governing the clergyman; for in cases of fines paid on the lease, in consideration of which the rent is reduced, the amount of the fine must be considered in estimating the true yearly value. And it is the true construction of the act, that the clergyman should have tithes according to the full yearly value, though perhaps, where rent comes fairly near the annual value, a further claim would not be encouraged. In the case of *Ward* v. *Hilder* (n), the defendant admitted having paid tithes at a rate of 1 *l.* 16*s.* assessed upon him for his premises; but when he brought the question of his liability to pay so much before the Court, the Court decreed that notwithstanding he had paid at that rate for a long period, that of right he ought to have paid at the rate of 2 *s.* 9 *d.* in the pound on the yearly rent or annual value of the premises, which was proved to be 40 *l.* The plaintiffs, it seems, having thus established their right, submitted to continue to accept the former payment of 1 *l.* 16*s.* if the defendant would continue to pay it: but he having refused to do so, the Court made a decree, "that he "should pay the tithes after the rate of 2 *s.* 9 *d.* in "the pound rent or value of the premises; the same "to be rated at and after the rate of 30 *l.* *per annum* "for the yearly rent or value of the said house and "premises, which amounted at that rate to 4 *l.* 2*s.* 6*d.*"

(n) 2 Gw. 538.

 and

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and that sum he was decreed to pay. In *Williamson* v. *Gosling* (o), there were customary payments set up by the defendant, and proved as to some of the houses for which tithes were paid; but where no such payment was in proof, the Court decreed him to pay 2*s.* 9*d.* in the pound. And such also was the decree in *Bramston* v. *Heron* (p). In the report of the two last-mentioned cases, I observe that the words, "according to the annual value," which should follow the amount of the rate, are omitted. Now those words certainly are a strong expression of the meaning of the decree itself, and are to be found in it, and are therefore worthy of observation. In *Kynaston* v. *The East India Company* *, which is noticed.

(o) 3 Gw. 902. (p) 4 Gw. 1314.

February 1803.

KYNASTON v. The EAST INDIA COMPANY.

4 Hare 170

4 Dell Mr Ch
4 Gw 829

* That case was ultimately decided in the House of Lords. The short statement of it is this.—On a bill filed in *January* 1800, by the impropriate Rector of *St. Botolph* against certain occupiers of houses and warehouses, for the tithes thereof, according to the then improved annual value;—the defendants pleaded, that they, as owners of the buildings in question, had never paid any rent for their occupation;—that formerly there were some obscure buildings on the same site, which most probably never paid any rent; but they admitted having paid 1*s.* in the pound to the plaintiff for tithes, after a rate of 300*l.* a year, (the proportion of the land tax,) from the year 1776 to *Midsummer* then last, insisting it was in their own wrong. The cause was heard in *February* 1803; *Plumer*, *Richards*, *Stanley*, and *Kynaston*, for the plaintiff; and *Pigott*, *Adams*, and *Wyatt*, for the defendant: when MACDONALD, *Chief Baron*, gave judgment †. 'This defence proceeds on the notion, that as no rent has ever been paid for these premises, there is no criterion by which they can be assessed under this statute (37 *H.* VIII. ch. 12); and it is therefore contended, on the authority of the case of *Skidmore*

† Taken from a very full note on the brief of a gentleman who was of counsel in the cause.

noticed in *Antrobus* v. *The East India Company* (*q*), where all the cases are brought together, that precise point

(*q*) 13 Ves. 9.

Skidmore v. *Bell*, C. B.—M. 5 Jac. *,—where it was resolved that such houses as were never letten to farm, but inhabited by the owner, were *casus omissus*, and should pay tithes by the decree,—that these buildings are not liable. Looking into the decree book for the cases said to have decided that the tithes must be paid according to the rent or value, the words appear to be used synonimously, and so they are in the reports and schedules. Two decided cases which have been cited go home to this point: in *Bramston* v. *Heron* an exemption was claimed for a new-built house on the scite of old houses, because no rent had ever been paid; but the Court decreed that the defendant should pay tithes for the new house. There was no necessity to resort to value in that case, because there was a rent, but it shows that a new-built house ought to pay. Then the case of *Williamson* v. *Gosling* goes the whole length: there the claim of the rector was the same, and so was the situation of *Gosling*'s two houses, which were built on the sites of four, three of which had paid ancient sums. The defendant said, he had himself occupied one of the houses of about the yearly value of 100*l*. Now that was the case of a house built on the scites of old houses, and the decree was, that in respect of the three they were protected by the ancient payment; but that, for the new house, the defendant should pay 2*s*. 9*d*. in the pound, according to the yearly value, which was the value stated, or thereabouts †. Then compare the cases: this is that of a warehouse built on sites of houses which had never paid rent, and it runs therefore on all fours with the case cited; therefore the decree must be, that the defendants shall pay according to the annual value, after the rate of 2*s*. 9*d*. in the pound; but as the caes is entangled no costs will be given.'

The defendants appealed to the House of Lords, who, on the 25th February 1813, affirmed the decree.

* 2 Inst. 659.

† The reports of these two cases as given in Gw. vol. iv. p. 1314, and vol. iii. p. 902, do not go far enough to furnish several particulars in those cases which are here noticed and acted on.

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point is determined; and that case, I believe, was ultimately decided in the House of Lords, or if not, I would only cite it for the principle furnished by the opinion of the Court, for the construction of this act. The decision in the case of *Antrobus* v. the *East India Company* was affirmed in the House of Lords, the principle of which is imperatively applicable, and must govern this case.

Under these circumstances, I am of opinion, that the plaintiffs ought to have a decree in their favour.

Courts of Equity are not bound in tithe causes to any limitation in point of the time for which the tithes are sought, although *a convenienti*, it has been usual to confine the account to a period of six years where the Court sees no reason to depart from such usage.

As to the time from whence the account must be decreed.—Notwithstanding Courts of Equity are not bound in a tithe cause to any limitation of time,—(for it is a great mistake to consider the usual period of six years, to which the Court generally confines itself for its own convenience and that of the parties, and I should always consider myself bound to observe that limitation, unless I saw some reason to the contrary;)—yet, as I do not see any such reason in the present case, I shall confine the decree for an account, to the period of six years before the filing of the bill. The Bishop, in his answer, has stated what he conceives to be the annual value of the premises; but if there should be any difficulty about that, it must be referred to the Deputy Remembrancer, in the usual manner.

Then as to costs.—In all cases of this kind I feel great reluctance to give costs, and notwithstanding I think, myself, that the principle of the decided cases completely govern this, yet it might still

still be fairly thought by many to be a singular case. I shall, however, be guided by what has hitherto been the practice in the other cases.

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Account decreed (with Costs.)

IN THE EXCHEQUER CHAMBER.

(IN EQUITY.)

(*Coram* RICHARDS, Chief Baron.)

JEE *v.* HOCKLEY and others.

[*Same Day.*]

4 N are 334

THE plaintiff filed this bill, as Vicar of *Tharsted, (Essex,)* for an account of all tithes, except hay, calves, and milk. The defendants pleaded farm moduses.

The amount of money-payments laid as *moduses* in answer to a vicar's claim, being totally inconsistent with the value of the vicarage as estimated by the ancient documents usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted) to induce the Court to dispense with an issue.

Hockley (for the farm called *Blunts)* set up a *modus* of 12*s.* 6*d.* for the tithes of hay, calves and milk, and all other titheable matters claimed by the bill, *except turnips, patatoes, clover-seed, cole-seed, and other small seeds**; and other *moduses* of different sums, in the same terms, for various other farms, amounting together to 13*l.* 18*s.* 7*d.* And they proved the money-payments to have been uniformly made during living memory.

It seems to be no objection to the laying a *modus* that it except articles modern introduction, *speciatim.*

* This was adverted to by the plaintiff's counsel as an objection in point of form of pleading, but the defendants were permitted to go into the evidence.

Martin,

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Martin, and *Shadwell*, for the plaintiff.

Dauncey, and *Boteler*, for the defendants.

For the plaintiff it was contended,—that the value of the vicarage itself was estimated at so low a rate, by the ancient documents put in, (the *Nona Rolls*, A. D. 1342, rectory and vicarage together, 38*l.*;—the *Ecclesiastical Survey*, 26 *Hen.* VIII. A. D. 1535, 20*l.*;—*Pope Nicholas's Taxation*, 38*l.*, rectory 50 marks, (33*l.* 6*s.* 8*d.*), vicarage 7 marks, (4*l.* 13*s.* 4*d.*);—*Parliamentary Survey*, 70*l.*) that it was impossible the payments relied on could be so ancient as to be entitled to be considered by the Court as moduses.

On the other hand, it was insisted, that the usage proved, opposed to those documents, was sufficient to raise such a doubt as to make a further inquiry necessary.

RICHARDS, *Chief Baron*.—These ancient documents have never been considered as conclusive, in any case that I have ever met with. And when I see an uniform money-payment, proved to have been constantly paid for so many years, I cannot take upon myself to say that evidence which is anterior, shall, on that account alone, destroy evidence which is posterior in point of time. And however desirous I may be, (as I always shall,) to save to parties the expense of issues, I must, in such a case as this, direct a further inquiry as to these payments, if required: and if issues are taken, it must be for each farm.

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HARRY, Administrator, *v.* ELIZ. JONES, Widow and Administratrix of DANIEL JONES.—(Demurrer.)

Tuesday, 13th May.

An administratrix claiming under a marriage settlement to retain her debt, need not, in pleading the articles to an action brought against her for a simple contract debt, due from the intestate, state that they were in writing or under seal, or plead them with a *profert*, or set out the consideration more particularly; the object of such a plea being merely to show her right to retain a debt accruing to her thereby, against other creditors of equal degree, and to let in evidence in support of such retainer, on the plea of *plene administravit*.

THE plaintiff declared in special *assumpsit* as administrator on a joint and several promissory note, given by *Daniel Jones*, and two other persons, to the intestate *David Harry*. The defendant pleaded *non assumpsit—plene administravit*—and *actionem non*; because, she says, that by certain articles of agreement and marriage settlement, made and agreed upon heretofore, in the life-time of the said *Daniel Jones*, deceased, to wit the 11th day of *May*, in the year of our Lord 1802, between one *John Jones* of the first part; the said *Elizabeth*, administratrix as aforesaid, of the second; the said *Daniel*, deceased, of the third part; and one *David Jones* of the fourth part, the said *Daniel Jones*, deceased, for the considerations in the said articles of agreement and marriage settlement mentioned, and for making a provision for the said *Elizabeth*, administratrix as aforesaid, his intended wife, and for other good and valuable considerations him thereunto especially moving, did thereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *David Jones*, his executors and administrators, in manner following; (that is to say,) That in case the said marriage should take effect, and the said *Daniel Jones*, deceased, should happen to die in the life-time of the said *Elizabeth*, his said intended wife, then

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then that the executors or administrators of the said *Daniel Jones*, deceased, should and would well and truly pay or cause to be paid to the said *David Jones*, his executors, administrators or assigns, the sum of 400 *l.* of lawful money of the united kingdom of *Great Britain* and *Ireland* current in *England*; and also should and would deliver unto the said *David Jones*, his executors or administrators, all the household goods and furniture, of what kind or nature soever the same might be, which the said *Daniel Jones*, deceased, should die possessed of, in trust, nevertheless, to and for the only use and benefit of the said *Elizabeth*, administratrix as aforesaid, her executors, administrators and assigns, in lieu of, and in bar of all her claim of dower, or thirds of, in, to, or out of the real and personal esstate of which he the said *Daniel Jones*, deceased, then was, or at the time of his decease might be seised or possessed of, or entitled unto. And the said *Elizabeth*, as administratrix as aforesaid, in fact saith, that afterwards, and after the making of the said articles of agreement or marriage settlement, to wit, on the day and year aforesaid, at *Llandilo* aforesaid, in the county aforesaid, the said marriage, between the said *Daniel Jones*, deceased, and the said *Elizabeth*, administratrix as aforesaid, was duly had and solemnized; and the said *Elizabeth*, administratrix as aforesaid, hath survived the said *Daniel Jones*, deceased, and the said sum of 400 *l.* in the said articles of agreement and marriage settlement still remains wholly in arrear and unpaid to the said *David Jones*, to wit, at *Llandilo* aforesaid, in the county aforesaid; and the said *Elizabeth*, as administratrix as aforesaid, further

ther saith, that she hath fully administered all and singular the goods and chattels which were of the said *Daniel Jones*, deceased, at the time of his death, and which have ever come to the hands of her the said *Elizabeth* as administratrix as aforesaid to be administered, except goods and chattels of small value, to wit, of the value of 10*l.* and except the household goods and furniture which the said *Daniel* died possessed of at the time of his decease, and that she hath not, nor on the day of exhibiting the bill aforesaid, or at any time afterwards, had any goods or chattels which were of the said *Daniel Jones*, deceased, at the time of his death, except the said first mentioned goods and chattels of the value aforesaid, and the said household goods and furniture aforesaid, which are not sufficient to pay or satisfy the monies due and owing to the said *David Jones* as aforesaid, in trust to and for the only use and benefit of the said *Elizabeth*, administratrix as aforesaid, and which she the said *Elizabeth*, as administratrix as aforesaid, retains in her own hands towards and in part satisfaction and payment thereof; and this she the said *Elizabeth*, administratrix as aforesaid, is ready to verify: Wherefore she prays judgment if the said *John*, administrator as aforesaid, ought to have or maintain his aforesaid action thereof against her, &c.

To that plea there was a demurrer, for the following causes:—that it is not stated or shown in or by the said last plea, that the said supposed articles of agreement and marriage settlement, in that plea mentioned, were sealed with the seal of the said *Daniel*

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Daniel Jones, deceased, or signed by him, nor is there any *profert* in the said plea, of the said supposed articles of agreement and marriage settlement; and also, for that the full considerations for the said *Daniel Jones* making the supposed articles of agreement and marriage settlement, are not stated or shown in the said last plea, but, contrary to the rules of pleading, it is stated and alleged in the said last plea, that the said *Daniel Jones*, for the considerations in the said articles of agreement and marriage settlement mentioned, and for making a provision for the said *Elizabeth*, and for other good and valuable considerations him thereunto especially moving, did make the said supposed covenant, promise and agreement in the said last plea mentioned; and also, for that it is not stated or alleged in the said last plea, that the said supposed articles of agreement and marriage settlement were made by the said *Daniel Jones* for or in consideration of marriage, or any other valuable consideration, so as to authorize the said *Elizabeth* to retain any part of the goods and chattels of the said *Daniel Jones*, in satisfacton of the said covenant, promise and agreement, in the said last plea mentioned; and also, for that it is not stated or alleged in the said last plea, that the said *Elizabeth*, or the said *David Jones*, by the said articles of agreement, covenanted or agreed with the said *Daniel Jones*, that the said *Elizabeth* should marry the said *Daniel Jones*; and for that it does not appear that there was any mutuality in the said supposed articles of agreement and marriage settlement, or any valuable or sufficient consideration for the said *Daniel Jones*

Jones making the said supposed covenant, promise and agreement, in the said last plea mentioned; and also, for that although by law no covenant or agreement of a person can pass or convey an interest in, or right to goods and chattels, the property wherein such person afterwards acquires; yet nevertheless, the said *Elizabeth* hath in and by her said last plea alleged, that the household goods and furniture which the said *Daniel Jones* died possessed of, became and were the specific property of the said *David Jones*, in trust for the use and benefit of the said *Elizabeth*; and also, for that the said *Elizabeth* hath not stated and shown in and by her said last plea, what was or is the value of the said household goods and furniture, whereof the said *Daniel Jones* so died possessed as aforesaid; and also, for that the said last plea is in other respects uncertain, informal and insufficient, &c.

Chitty, in support of the demurrer, submitted, first, that the articles of agreement and marriage settlement ought to have been stated in the plea to be in writing, and sealed and signed; and he cited the case of *Duppa* v. *Mayo* (a), where those requisites are said to be indispensable in a plea, though not in a declaration; and the more so as it is required by the statute of frauds, that all agreements made upon consideration of marriage shall be in writing, and signed by the party to be charged therewith, and without that it does not appear to be such a contract as could be enforced:—2dly, that it was also necessary that the full consideration

(a) 1 Saund. 276. n. 2.

should

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should be stated, *Clarke* v. *Gray (b)*, *Miles* v. *Sheward (c)*, *Andrew* v. *Whitehead (d)*; whereas all that is stated in the plea is, that by reference to the articles, of which there is no *profert*, nor does there appear by the articles, as pleaded, to have been any mutuality of benefit:—3dly, that the covenant, as stated in the plea, was objectionable, because it would go to convey all the interest of the husband, in whatever property he might at any time *afterwards* acquire, to any amount, which could not be done by law, *Reed* v. *Blades (e)*;—and, lastly, that it would also give the person, so conveying such after-acquired property, the undue advantage of a false credit.

Peake, in support of the plea, contended,—that as this was merely a question of the administratrix's right to *retain* her debt, it was not necessary to plead that the articles under which she claimed were sealed, because the plaintiff's demand being on simple contract, it was sufficient that her's should be shown to be a debt of equal degree;—that the articles were in writing (he submitted) clearly appeared from the language of the plea, although there was no express averment to that effect; and that that is matter of evidence, if the statute of frauds is objected to it.

In the case of *Plumer* v. *Marchant (f)*, it was held that, under circumstances very like the pre-

(b) 6 East. 568.
(c) 8 Ib. 7.
(d) 13 Ib. 102.
(e) 5 Taunt. 222.
(f) 3 Bur. 1380.

sent,

sent, an administrator might give retainer under such a covenant in evidence, on *plene administravit*, without pleading the special matter of the settlement under which he was entitled; and that an action of covenant was as much a lien on assets as an action of debt. The agreement in that case was to pay and deliver, either in money, goods, chattels or effects, out of the intestate's personal estate, the sum of 700*l.* to the defendant and another trustee, within six months after his death,—the interest to be paid to his wife during her life.

The case of *Jarman* v. *Woolloton* (*h*) has established, that a woman may, before marriage, convey her stock in trade and furniture to trustees, by which they become not subject to his debts,—and that, although there was no inventory of what that stock and furniture consisted. And it is determined in the case of *Cadogan* v. *Kennett* (*i*), that such a settlement of household furniture is good against creditors, even for debts due at the time, although it remained, after marriage, in the possession of the husband. Those cases furnish an answer also to the objection of a false credit being given; besides that this is not a question in a case of bankruptcy.

As to the want of consideration being stated, there can be no doubt on this plea that the consideration was the marriage; which, there is also no

(*h*) 3 T. R. 618. (*i*) Cowp. 432.

doubt,

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doubt, is a valuable one; and the widow stands in the place of any other creditor of equal degree, and may, as administratrix, prefer her own debt. This plea does not insist on the settlement being good as a *transfer* of subsequently acquired property, but merely as giving her a right to *retain* her debt out of the *intestate*'s effects.

The case cited from *Saunders* does not go the whole length contended for, and no prudent pleader ever states a contract to be in writing; but from the whole tenor of the plea, that is sufficiently obvious, even if it had been necessary that that should appear.

Chitty, in reply, observed, that the case of *Jarman* v. *Woolloton* was distinguishable from the present; because there the goods settled were originally the property of the wife, and they remained after marriage in her possession while she carried on a separate trade. In the other cases, cited from *Burrow* and *Cowper*, there was a consideration stated of a large sum of money received with the wife on the marriage; and here, as the defendant has professed to set out the consideration in the plea, it should have been done fully: but from what appears on the face of this plea, if it can be supported, creditors may be continually defeated under similar circumstances.

GRAHAM, *Baron*.—Of the various objections which have been made to this plea, the most considerable

derable is, that the articles are not stated to be in writing, or signed and sealed; but that has been well answered, notwithstanding the authority of *Duppa* v. *Mayo*, by the argument that that would be matter of evidence on such a plea, and need not be averred on a mere question of a right to retain a debt by an administratrix. It would, however, have been more technical to have stated it. It is impossible to contend, that it does not appear by this plea that the articles were in writing; for it admits of no doubt, because the whole is set out. As to there being no consideration stated, it is said, in express terms, to be for making a provision for the wife; and the words "and for other considerations," meaning any thing or nothing, cannot destroy the effect of this plea. There is no necessity to cite cases to show that such an instrument as this need not be set out *verbatim*. If, indeed, the essential part of the contract be not pleaded, it might be demurrable; but here a sufficient consideration appears, and that the intended marriage took effect: and that is an answer to the objection of there being no mutuality.

Then the question is, whether the defendant had a right to retain to the amount of her claim; and on that point the case of *Plumer* v. *Marchant* is decisive. It was there held, that the plea of *plene administravit* would let in evidence to justify a retainer, and what was said by the Court there is equally applicable in this case; and the covenant there was like the present agreement, and only

 sounded

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sounded in damages. The sole difference in the cases is the degree of the debt. It would have been most idle in the administratrix to have procured an action to have been brought against her for her own debt; but she has properly avoided such a circuitous mode, and therefore this demurrer ought to be overruled.

GARROW, *Baron*, of the same opinion.—If I had the least doubt on this case, I should wish it to stand over till the Court should be full. It is quite sufficient for this plea to show there was a legal contract, and that it has done; and as to the consideration, the articles are expressly stated to be made for a provision for the wife, and in bar of dower. However striking the argument may be that this was a secret deed, giving a false credit, it is now much too late to raise such an objection to instruments of this kind between husband and wife, however hard it may be as against creditors.

Judgment for the defendant.

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1 Ro 731
3 Hare 421

PRIOR, and H. PENPRAZE, and JAMES PENPRAZE, v. WM. PENPRAZE and WILLIAMS.—(Demurrer.)

Tuesday, 13th May.

Demurrer by a judgment creditor to a bill, for an injunction to restrain him from taking out execution on his judgment, against an estate sold before he obtained judgment, and ineffectually conveyed to the purchaser (the plaintiff),—whereby the legal estate descended, since the date of his judgment, to the heir at law,—overruled.

THIS Bill was filed against the defendants, one of whom was the heir at law, and the other a judgment creditor of *Henry Penpraze*, deceased. It charged,—that *Henry Penpraze* had in his lifetime, (in *March* 1809,) sold a freehold lease of certain premises granted to him for the lives of himself, and of *Henry* and *James*, his sons, and other premises held by him under a lease for ninety-nine years, to the plaintiff, *Prior*, and *John Treloar* (since deceased,) in consideration of 120 *l.*, and a conveyance thereof was executed, with a covenant for further assurance;—that in the following *March*, *Prior* and *Treloar* demised all the said premises to plaintiffs, *H.* (the younger) and *J. Penpraze*;—that *Henry Penpraze* died, leaving defendant, *W. Penpraze*, his eldest son and heir at law;—that plaintiffs had lately discovered that, in consequence of a mistake in the conveyance (which was dated 10th *March* 1809,) it did not operate to convey the freehold, because it was not to take effect, by the terms of the conveyance, till the 25th *March*. But that defendants, *William Penpraze*, combining with *William Williams*, &c. not only refused to execute a proper conveyance of the said premises to plaintiff, but was colluding with *Williams*, who had sued out a writ of *scire facias*, for the

 purpose

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purpose of reviving a judgment on a verdict, recovered by him in an action at law which had been brought against him by *Henry Penpraze*, deceased, by means of which, the defendant, *Williams*, threatened, if the plaintiffs should succeed in getting a valid re-conveyance of the premises, to harass them by proceedings at law.—Prayed decree that such error in the conveyance might be corrected, and a good conveyance executed; and that *Williams* might be restrained, by injunction, from proceeding by writ of *elegit* or otherwise at law.

Demurrer, by *William Williams*, that the bill contained no matter of equity whereon to ground a decree against him.

Roupell stated, that the facts of this case, as they concerned the defendant *Williams*, were,—that the deed of 10th of *March* 1809 was fraudulent, and without consideration;—that in the year 1807, *Henry Penpraze*, deceased, brought an action of trespass against *Williams*, to ascertain a disputed right of way, which was tried at the Assizes for the county of *Cornwall* in *March* 1809, when a verdict was found for the defendant. Costs were taxed, and judgment signed in *Easter* Term following, and execution taken out for 130 *l.*—That the pretended sale of the premises in question to plaintiffs, *Prior* and *Treloar*, who was the father-in-law of plaintiff, *H. Penpraze*, was a mere pretence for defrauding the defendant of the fruits of his said judgment; and that the pretended consideration

deration of 120 *l.* had not been in fact, and *bonâ fide*, paid with the proper monies of the plaintiffs. He contended, therefore, in support of the demurrer,—that whatever Equity the plaintiffs might have against the defendant, *Penpraze*, there was nothing in the bill which could affect the right of a third person, who was a judgment creditor, to revive his judgment against any assets which had descended; nor was there any thing stated to affect the conscience of *William Williams*, who had no notice of the purchase, except a very general and common charge of collusion, which could not have the effect of precluding him from taking advantage of a want of equity by demurrer.

Martin, and *Richards*, for the bill, submitted,—that at the time when the conveyance in question was executed, there was no debt of the judgment creditor in existence which could affect the lands of the debtor. If *H. Penpraze*, deceased, had at the time only agreed to convey the premises, the purchaser might have compelled a specific performance in Equity; but his having actually executed the deed, turns him into a trustee for the plaintiffs, in whose hands, as such, creditors under a commission of bankruptcy could not take the lands. He had then only the legal estate in the lands, and the plaintiffs, who had the equitable interest, could at any time have compelled him to convey them; and a creditor has no right to take advantage of a trustee, not having clothed a purchaser with the legal title before he obtained his judgment.

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Roupell, contrà.—The defendant *Williams* had nothing to do with any equity of the plaintiffs against the defendant *Penpraze.* He is a legal, not an equitable claimant; and such a contract cannot protect the premises from judgments. It is incumbent on a purchaser to search for judgment, not only when he contracts for his purchase, but up to the last moment before it is finally completed.

GRAHAM, *Baron.*—I was much struck with the objection to this bill at first, but on further consideration I think it must be answered; for the bill was properly filed against *William Penpraze*, calling on him to confirm the plaintiffs' title; because, if the facts alleged in the bill are true, as the demurrer admits, he can only be considered as a mere trustee for the plaintiffs. He is only entitled at all by reason of a defect in the conveyance. The charge of collusion might have been made in broader terms; but independently of that, there is enough to show that the plaintiffs have a right to restrain the operation of the *scire facias*; and a Court of Equity has the means of enforcing from him an account of the rent and profits received by the trustee, unless the defendant could put himself into the situation of a purchaser for a valuable consideration without notice. Here *Williams* has only an equitable, not a legal lien, and one which is not in any respect preferable to the plaintiffs'. I think, therefore, that the plaintiffs have a right to the relief sought by this bill, and to have a re-conveyance from *William Penpraze*; and,

and, ultimately, an injunction against *Williams*, to restrain him from suing out execution against these lands.

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Demurrer overruled.

MILNES *v.* COWLEY and others.

14th May.

The Statute of Limitations cannot be pleaded by trustees, in answer to a charge of breach of trust, to defend them from the consequences of neglecting their duty in having sold an estate charged with the payment of a sum of money, without satisfying that demand.

THE Bill stated,—that in consideration of an intended marriage between the plaintiff and *Margaret Marples*, the daughter of *John Marples*, deceased, the following agreement was entered into between *Robert Milnes*, the father of the plaintiff, and the said *John Marples*, dated 12th *November* 1778: "That *Robert Milnes* would for himself, before or "upon *John Milnes*' day of marriage with *Mar-* "*garet Marples*, give in lands, goods, money, or "securities, the sum of 500*l.* unto *John Milnes* his "son. And that *John Marples* would, before or "upon *Margaret Marples*' day of marriage with "*John Milnes*, give in lands, goods, money, or "securities, the sum of 250*l.* unto *Margaret* "*Marples*. And *Robert Milnes* further agrees, "that he and his wife will resign up all the house "and lands they now rent, unto *John Milnes*; and "if they cannot agree to live together, the said "*Robert Milnes* will take another place, or live "separate in the said house."—That the marriage

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took place shortly after the agreement, and *Robert Milnes*, the plaintiff's father, performed his part of the agreement; but *John Marples* never performed his part—That *Margaret Milnes*, the wife of the plaintiff, was dead; and that *John Marples* also died the 9th *December* 1808, having by his will devised his real estate to *Leonard Cowley* and *John Foulds*, two of the defendants, upon certain trusts; and the residue of his estate and effects he directed to be divided among his children (who were also defendants) in the manner stated in the will.—That *Cowley* and *Foulds* administered to his will, and became his personal representatives, and as such, possessed his personal estate, and entered as his devisees into possession of his real estates.—That some difficulty arose with respect to the mode of payment of the said 250*l.*, and as to the dower of the testator's widow; and in consequence thereof a meeting of all the parties, interested under the will, took place on the 19th *March* 1810, when an agreement was entered into for the purpose of authorizing the trustees to sell and convey certain parts of the said testator's real estates, and out of the produce thereof to pay a certain sum to the said testator's widow, in lieu of her dower; and also to pay to the plaintiff the sum of 250*l.* in satisfaction and discharge of the marriage portion, agreed by the said *John Marples* to be paid to the said plaintiff, on his marriage with *Margaret* his late wife, upon his executing a proper release and discharge for the same.—That such last-mentioned agreement was signed by *John Dob Marples* and *Robert Marples*, two of the said testator's children,

dren, and by the plaintiff, but was never carried into effect.—That the plaintiff had frequently applied to the said defendants, *Cowley* and *Foulds*, as such trustees, to pay the said 250 *l.*

And it charged, that the defendants, *Cowley* and *Foulds*, had in various instances admitted the validity of the agreement, and acted on the same; and, as evidence thereof, charged,—that previous to 19th *March* 1809, they had sold part of the testator's estate to *Robert Marples*, one of the defendants, and that on such occasion the said defendant, *Robert Marples*, applied to the persons beneficially interested in the money arising from the sale of such premises, and represented that he had paid much more than the worth, and requested them to abate 5 *l.* each out of their respective shares. And thereupon the following agreement was prepared by *John Bower*, the attorney of *Cowley* and *Foulds*: "We, whose names are underwritten, do hereby "agree to allow our brother, *John Marples*, 5 *l.* "a-piece, out of the purchase-money for the house "and premises at *Apperknowle*, out of the shares "coming to us under the will of our father, *John* "*Marples*;" and which agreement was signed by the said *John Dob Marples*, and by two other of the defendants, *John Rikney* and *William Syddale*, the husbands of two of the said testator's daughters. And the said *John Bower* also wrote as follows at the foot of the agreement: "I agree to allow according to my share," which he tendered for the adoption and signature of the plaintiff, who

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who agreed to make such allowance, and signed the same.

And the bill prayed, that the agreement might be established, and that the defendants, *Cowley* and *Foulds*, might, out of the personal estate and effects of the testator, *John Marples*, pay and satisfy the said 250*l.* and interest; and in case the personal estate should be insufficient, then that such deficiency might be supplied by a sale of the real estate.

To this agreement the defendants, *Cowley* and *Foulds*, pleaded the Statute of Limitations.

Phillimore, in support of the plea, submitted,—that the statute of limitations was well pleaded to a bill seeking to carry into effect an agreement for payment of a sum of money of nearly forty years standing, without any reason having been given why the claim had lain so long dormant;—and that, if it was intended to be argued that the subsequent agreement of 1810 had destroyed the operation of the statute, the answer to that would be, that it was not signed by the trustees, against whom this bill was filed.

Roots, contrà, contended,—that the marriage having been carried into effect, the right of the plaintiff became absolute;—that it was very natural that during the life of the testator the plaintiff should not have pressed for payment;—that the plaintiff

plaintiff had performed his part of the agreement, and therefore the statute of limitations could not apply, particularly when pleaded by trustees, who were mere conduit-pipes, and had no interest, and were, in fact, themselves neglectful of their duty in not having paid the money;—and that as, at the meeting of all the parties really and beneficially interested, they had, by the agreement of 1810, recognized the plaintiff's claim, and engaged to satisfy it, the trustees could not now plead the statute in bar to it.

Phillimore, in reply, cited a case from *Viner's Abr.* tit. Statute Limitations, p. 124, (citing *Nels. Abr.* 1125,) where it was held that, on a bill filed, on a note given to assure lands upon marriage, twenty years after it was given, the claim was barred by the statute.

GRAHAM, *Baron.*—In the view that I have taken of this case, I am of opinion that the plea cannot stand as a bar to the plaintiff's suit. The case which has been cited from *Viner* stands nakedly, and, for any thing that appears, the promissory note in that case might have been given by a stranger; nor does it enable us at all to see the nature of the transaction. As to the demand not having been made for so long a time, nothing is more common than to postpone such a claim during the life of the parties connected in blood. The agreement of 1810 rebuts the presumption of the money having been previously paid. But, independent of the question

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question of the operation of the statute of limitations on trusts, in ordinary cases, the trustees in the present instance have been guilty of a breach of trust, in having omitted to do their duty in the first instance; for, on the death of *John Marples* the father, this covenant was a lien on his estate, both real and personal, and ought to have been satisfied. It is extremely clear that the testator's estate was affected by the trusts when the property was sold. On that ground, therefore, the plea must be overruled; but it may stand for an answer, with liberty to the plaintiff to except.

WOOD, *Baron*, absent.

GARROW, *Baron*, concurred.—These defendants, who are trustees, were stakeholders of a fund, with knowledge of the claims which existed against it; and that is averred in the bill, as well as that they recognized the plaintiff's claim by the agreement of 1810. It was their duty, on the death of the testator, to have applied his estates to the purposes for which they had been so marked by him in his life-time. It appears that, on the part of the plaintiff, all that he had engaged for was done, and that raised a competent consideration for the fulfilment of the agreement, on the part of *John Marples*.

I am therefore of opinion, that this is not a case where the statute of limitations may be pleaded in bar of the plaintiff's claim. It might perhaps have been

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been fair enough as an experiment, but nothing more; for the last ground stated by my brother *Graham* is quite conclusive against it.

Plea overruled; but ordered to stand as an answer, with liberty for the plaintiff to except.

IN THE EXCHEQUER CHAMBER.

(*Coram* RICHARDS, Lord Chief Baron.)

DORMAN and others *v.* CURRY and others.

Wednesday, 14th May.

A rector—claiming tithe of seeds against a vicar, endowed of all small tithes except hay, on the ground

THE plaintiffs, who were lessees of the rectory of *Dartford* in *Kent*, claimed by the present bill, from the defendant *Curry*, (the vicar of the parish,) and from all the defendants except *Warde*, (from whom they claimed only the tithe of seeds,) the tithe of

of a presumption, that as the former has had perception of the tithe of seeds, notwithstanding the terms of the endowment of the latter, who had also had immemorial perception of the tithe of corn of certain lands, *ultra* his endowment, an ancient exchange must be presumed of vicarial for rectorial tithes—will be held to *strict* proof of his title to the tithes sought; and he must show, by satisfactory evidence, that the vicar has granted them back to him, or made the alleged exchange. Nor is his perception of the tithe in question available against perception by the vicar, if the subject-matter of dispute be one of those which were formerly doubtful, as to their being a rectorial or vicarial tithe.

Nor can the rector insist on an issue in such a case: for no presumption will be raised in his favour, because he is in the situation of a claimant contesting his own grant, and has clothed the vicar whom he has endowed, with his inherent common-law right.

Note. Such a bill dismissed, *with costs.*

green

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green fodder and clover seeds. The claim of the tithe of seeds (on which alone the judgment of the Court proceeded at present) lay, in point of fact, between the rector and vicar, and was founded on the part of the former, as appeared by the bill, on the ground that a partial exchange of the rectorial and vicarial tithes was to be presumed, from perception, to have been effected before time of memory: for that the vicarage was endowed with the tithe of hay on certain lands called *Dartford Salt Marsh*, and not of corn; yet the vicar, it was alleged, had constantly received the tithe of corn from the same lands: whereas, on the other hand, the lessees of the rectory had always received the tithes of artificial grasses and seeds from the other lands in the parish.

The principal defendant, *Curry*, admitting the perception of the tithe of corn, insisted, that if his right to it accrued by virtue of any exchange which had ever taken place between some former rector and vicar, it must have been given to him in lieu of the tithe of hay of certain lands called *King's Marsh*, of which the vicar had been endowed between the years 1291 and 1316, but which were always received, notwithstanding, by the lessees of the rector; and he denied that the lessees of the rector had had perception of the tithe of *seeds* on the other lands of the parish, except by usurpation, in some few instances where the vicar had not been apprised of their having been produced; insisting on his title, in virtue of his endowment, to the seeds of

of clover and other artificial grasses, and all other small tithes.

The documentary evidence produced by the plaintiffs consisted of various receipts for tithes, memoranda from vicar's books, and agreements for compositions. The first of the former, in point of time, was a receipt of one *Tasker*, lessee of the then rector, dated 4 *July* 1721, for 5*l.* 2*s.* 6*d.* "*for the tithes of ten acres of peas, and the tithes of three acres of cinquefoil seed last year.*" (*Q.* the place.)—A receipt, dated 4th *December* 1734, from the same person, "for 11*s.* 3*d.* for the tithe of 15 bushels of clover seed, sold Mr. *Allen*;—for 4½ acres of peas, and 3 ditto."—Another, dated 21st *July* 1770, from *Edmund Williams* to *John Dorman*, (as agent for the then lessee of the rectory,) for 14*s.* 6*d.* in full, for tithe of clover seed.—A copy of the following entry in the vicar's books,—"1734 to 1735, Mr. *Vaux*, *Feb.* 21, eight acres of clover, fed the first part of the year, and after for seed. The seed pays tithe to Mr. *Tasker*."—An agreement, dated *April* 4, 1775, signed by the said *Edmund Williams*, and several occupiers of lands in the parish of *Dartford*, whereby he let to them their tithes for their farms in the parish of *Dartford*, which concluded with this memorandum: "Clover seed, cinquefoil seed, turnip seed, in kind as usual."—Another agreement, dated *July* 15, 1776, whereby *John Powell*, an occupier, agreed to pay to *Edmund Williams*, for the tithe of his farm in the parish of *Dartford*, the following sums, for certain titheable matters: "Peas 6*s.* an acre; cinquefoil and clover

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clover 5*s.* 6*d.*; clover seed, after thrashing, to account for, and expenses allowed for thrashing, carrying and cleaning; turnip seed, or any seed, to account for, after cleaning and allowing for, as clover." In a subsequent agreement, dated *January* 1, 1780, between the then lessee of the rectory and an occupier, for certain rates or compositions by the year in lieu of the great tithes, was the following item: "For clover seed and turnip seed, one tenth part of the net profit, after all charges deducted, and rateably and proportionably for a less quantity, &c." They also produced an account, delivered by the defendant *Curry* to the plaintiffs as occupiers of lands in the parish, containing an item (which appeared to have been afterwards struck out,)—"Clover seed 12 bushels, omitted last year by mistake."

For the defendant *Curry* was produced his endowment:—29th *July* 1315,—"*in minutis decimis excepto fæno.*" It recited a former endowment and confirmation, with an augmentation of a house in *Dartford*, "*unà cum decimâ fæni viginti & unius acrarum prati vocati* Kynge's Marsh, *in parochia de* Dertforde, *prædictâ*;"—and, by the present instrument, he was also to have "*totam decimam fæni provenientem de magno prato salso*;"—and he put in various agreements for compositions, and extracts from pertinent documents, in some of which seeds were mentioned, and in others not.

Martin, and *Roupell*, on the part of the plaintiffs, relied on the usage as proved by the evidence of perception; which, they contended, was satisfactorily

torily shown, and well supported by the documents; on all of which they commented on, as affording evidence of the rector's right, and of his enjoyment of it.

Dauncey, *Hall*, and *Abercromby*, for the defendants, opposed to those documents the vicar's admitted right to small tithes; and they contended, on the authority of the cases of *Clarke* v. *Staplin (a)*, *Cartwright* v. *Baily (b)*, and *Jeremy* v. *Strangeways (c)*,—that the seeds of artificial grasses were a small tithe, and within such an endowment;—and that those grasses being of modern introduction, a title in the rector, by perception, could not be supported by evidence of usage. The case of *The Vicar of Kellington* v. *Trinity College, Cambridge (d)*, shows that the Court will protect the right of the vicar against an usurpation of fifty years, where it has been proved that before that time the vicar had received the tithe claimed by him.

Martin, in reply, contended, that an endowment, unsupported by usage, would not support a vicar's claim against a rector's common-law right. And, in answer to the cases cited, to show that seeds of artificial grasses were held to be a small tithe, observed, that that tithe was claimed by the plaintiffs, not as a rectorial but a *vicarial* tithe; and he submitted, that at all events the rector was entitled to an issue.

(a) 3 Gw. 926. (b) 3 Ib. 938.
(c) 4 Ib. 1173. (d) 2 Ib. 799. 1 Wilson, 170.

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RICHARDS, *Chief Baron.*—The real question, on this bill, is between the rector and the vicar; and between such parties the rector is certainly not entitled to an issue of course, and as a matter of right. Such questions must always depend altogether on the instrument by which the vicar is endowed, or the proof adduced by him of perception, as founding a presumption of an anterior endowment.

It is clear that the vicar has received out of this parsonage, from time to time, the tithe of all seeds. Then it is contended, that it is to be presumed from the usage that there must have been, formerly, an exchange effected between the rector and vicar, by which the tithes of corn were given up for those of green fodder and seeds: but there is no evidence offered of the existence of such an exchange, nor is there any ground laid for supposing that it ever took place. Now the insisting on the presumption of such an exchange, on the part of the rector, is in itself an admission that the vicar was formerly entitled to the tithe of those articles which he is said to have so given up in exchange. Then the rector comes here to affect his own grant: and the only foundation for his claiming these tithes is really (the supposed exchange being out of the question) nothing more or less than that he once had them, and granted them to the person from whom he now demands them.

To enable the rector to support his present claim, it is incumbent on him to make out his case by most satisfactory proof.

Now,

Now, what are his proofs? He produces certain receipts; the earliest is in 1721, and is given to *Tasker* (a lessee of the then rector,) for 5*l.* 2*s.* 6*d.* for the tithes of ten acres of peas and three acres of cinquefoil seed. Now that being an acknowledgment of having received the value of the tithes of peas, as well as of clover seed, that receipt proves too much; for on this record he sets up a right to the tithes of artificial seeds alone,—admitting, therefore, that the vicar is entitled to the tithe of peas. The next receipt is in 1734, and is for clover seed and for peas; peas, as I have observed, not being in dispute. There is next an agreement, dated 4th *April* 1775, whereby *Williams*, the agent of the lessee of the rectory, agrees to let to the occupiers the tithes of their farms, at the end of which is this memorandum; "Clover seed, cinquefoil seed, and turnip seed, in kind as usual." Now turnip seed is not claimed by the rector, therefore this evidence also proves too much. Another agreement in 1776 was put in, which has these words: "Any seed to account for, after cleaning and allowing for, as clover." Implying, that the agent of the lessee of the rector then claimed *all* seeds; and that again proves too much. Those instances of perception therefore are not to be relied on. And as to the paper delivered by *Curry*, which mentioned clover seed omitted, that item being aftewards struck out, proves nothing.

It is true that it was long very doubtful whether seeds were a great or small tithe, or belonged to the

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rector or vicar: but there have been many cases since, wherein it has been clearly held, that proof of payment of tithes of seeds to the rector, shall not affect the right of the vicar; and the reason is, that the prevailing erroneous notion of seeds being a great tithe, destroys the usual effect of the evidence of its perception as such by a rector.

I repeat, that a rector, having once endowed a vicar of tithes, who comes to reclaim those tithes, is bound to make out his case by clear and satisfactory evidence, and there is none offered in this case to show that the vicar ever granted them back to the rector. I therefore think that the case is in favour of the vicar. As against him, therefore, this bill must be dismissed to that extent; and also as against *Ward*, for the demand as to him is for the tithe of seed, and that tithe is certainly payable, not to the rector but the vicar, whose right to it is established by the result of this suit. As to them, therefore,

Bill dismissed, with costs.

SANDERS

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(*Coram* RICHARDS, Chief Baron.)

SANDERS *v.* LONGDEN and others.

Thursday, 15th May.

The Court will not make a decree in favour of a rector claiming tithes in kind of lands *not within his parish*, for which he has for many years received a money-payment by way of Composition, which the defendant does not pretend to insist on as a modus: nor will they grant a commission, to ascertain the boundaries of such lands, without a previous inquiry whether the plaintiff is entitled to any, and what tithes on such lands, by a trial at law on an issue; because such a claim is not *within the recognized common-law right* of a rector.

THE Plaintiff, who was rector of the parish of *Wollaton, (Nottingham,)* filed this bill against the defendants as occupiers of certain lands called *Sempringham Lands*, (being without the parish of *Wollaton,)* for an account and payment of tithes.

The bill,—after setting out the plaintiff's alleged title to a moiety of the tithes of corn, grain and hay of the said lands, formerly part of the possessions of the master prior and convent of the monastery of *Sempringham*, in the county of *Lincoln*, and stating, that on a suit *(Kendall* v. *Hardinge)* instituted by a former rector for the tithes of certain lands, &c. within the manor of *Bramcote*, called the *Sempringham Lands*, and for the purpose of compelling the then defendant to set forth the bounds and limits of the said lands, an issue was directed to be tried by action of debt, under the 2d *Edw.* VI, whereon a verdict was recovered by the plaintiff (the then rector) for the sum of 5*l.* the treble value of the tithes;—and that, upon the further hearing, a decree was made against the defendant for the payment of the tithes demanded by the bill, (for the last four years;) and that a commission should issue, to set forth such of the said lands as should

Nor will a former decree in favour of a predecessor of the plaintiff, and a verdict obtained by him on an issue under it, assist his case, or preclude the necessity of a new trial at law, if, ever since that decree and verdict, the succeeding rectors have neglected to take advantage of the result of the former suit, and received the same payment as before.

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be proved to have been in the defendant's occupation for such time, and to ascertain the value of the moiety of the tithes taken away by the defendant during that period;—and further stating, that all matters in dispute touching the premises being afterwards referred between them, the commissioners named in a certain commission for the examination of witnesses, &c. ultimately awarded, by their award dated 10 *October* 1672, the sum of 8*l.* to be paid to the then plaintiff on a day subsequent, for the said tithes; and that the defendant should also pay the plaintiff yearly thereafter the sum of 40*s.* during the continuance of the plaintiff's incumbency, in lieu of all tithes of the said lands;—and that the now plaintiff had given the present defendant notice of determining the said *composition* of 40*s. per annum:*—charged that the defendant pretended that the boundaries of the said lands had become so altered as not to be capable of being now specifically ascertained, and that the sum of 40*s.* a year paid by the defendant's predecessors for so long a period, was in its origin a charitable donation; whereas the defendant *Longden* had in his possession or power, documents from which the true boundaries and extent of the said lands might be made to appear, and the said sum of 40*s.* was a temporary composition paid in lieu of the said moiety of the tithes of the said lands.

Therefore the plaintiff now prayed,—that the defendant *Longden* might produce and leave all such documents in the hands of his clerk in Court;—and that he might set forth and discover the specific

cific lands or fields called or known (or formerly, &c.) by the name of *Sempringham Lands*, in *Bramcote* aforesaid, out of which the said tithes were thentofore taken;—and (if they could not now be specifically ascertained, by reason of their having been suffered to become altered,) that a commission might be issued for the purpose of ascertaining and distinguishing the same, or of allotting a fair equivalent.

The defendant, by his answer, denied all knowledge of the lands called *Sempringham Lands*, and of the plaintiff's right to demand the portion of tithes claimed by him in respect of them;—or that he knew whether the payment of the 40*s.* was a composition; or whether it had ever been paid to the plaintiff or his predecessors before the 10th *October* 1672; or when it was first paid; or from what origin it arose.

The plaintiff put in as evidence (besides the depositions of witnesses who spoke to the uniform payment of the 40*s.*) the Ecclesiastical Survey, 26th *Hen.* VIII. and the ministers accounts 32 *Hen.* VIII.; wherein, among the rectorial possessions of *Wollaton*, were noticed "tithes in *Bramcote*," and certain terriers from 1661 to 1781. By the first, plaintiff's predecessors were stated to be entitled to a portion of the tithes of *Sempringham Lands* in *Bramcote*; and, by the others, that that tithe had been compounded for, for 40*s.*

Martin, and *Dowdeswell*, for the plaintiff, (having

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ing detailed the case, and commented on the evidence,) submitted,—that the former decree and verdict had removed much of the plaintiff's difficulty in this case; and as the money-payment had been clearly proved, and there being no defence of *modus* set up, the right to tithes was established in the plaintiff, and he was therefore entitled to have a decree according to the prayer of the bill; or, at least, that the commission should be granted, and that the defendant might be decreed to furnish the documents required of him.

Clarke, for the defendant, contended,—that the plaintiff had not sufficiently made out his case to sustain his present demand, or to call on the defendant to answer it;—that the *onus* lay entirely on him, and until he had given some better evidence of his alleged right than he had done, the Court ought not to grant a commission on a speculative inquiry, which might eventually turn out to be nugatory. As to the former decree in favour of the plaintiff's predecessor, its not being acted on shows that it was not conclusive.

RICHARDS, *Chief Baron*, (dispensing with further argument on the part of the defendants.)—I have long ago felt the difficulties in the way of the plaintiff to be so great, that I cannot bring myself to decree any part of the prayer of the bill without first directing an issue, for I feel that the intervention of a Jury is necessary here; and I cannot order a commission, unless I can consider the plaintiff entitled to an account of the tithes sought

sought on the lands in question, which at present I do not. I admit the effect of the former decree and judgment, and the parties themselves do not appear to have quarrelled with the verdict; but then I have no evidence before me, accounting for the long subsequent acquiescence in the payment of forty shillings. That alone is sufficient to render the decree and verdict inconclusive, whatever might have been the effect of them at the time; and I must now consider that the land-owner has, notwithstanding, some defence to make. In the present instance, too, it is the business of the plaintiff to make out his case satisfactorily; for, as the lands are not in his parish, he is not standing on his common-law right as rector. On the contrary, the common law is against him here, for he is himself only a portionist, even if he should substantiate this claim. Then, as to that, it is perfectly clear that the rectors have always been paid the sum of forty shillings, and that is admitted by the defendant. Now, if they had the power at any time of enlarging that payment, by treating it as a composition for the tithes, it is certainly very singular that they should never have done so, and particularly when the former rector might have had the tithes in kind, if he had chosen to follow up the decree. I expected, therefore, that that would have been accounted for, by the plaintiff showing some subsequent agreement. He has not done so, however; and therefore I cannot decide conclusively on his rights without an issue, which I shall direct, as less expensive and hazardous than an action on the statute.

It

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It must be to try generally, whether the plaintiff is entitled to any and what tithes, arising out of any and what lands in the defendant's occupation; and the

Costs and further directions reserved.

The ATTORNEY GENERAL v. FARR.

Friday, 16th May.

An Objection to a count in an information on the 8th *Anne*, cap. 7, sec. 17, charging that the defendant was *assisting*, or *otherwise concerned in*, the unshipping prohibited and unaccustomed goods,—that it is a charge of *two distinct offences* by the *same count*, and therefore bad, either for duplicity or uncertainty,—was not allowed by the Court; who held, that the words did not involve two distinct offences; and that it was the established and ancient practice, *curia Scaccarii*, so to charge the offence in such informations.

OWEN, Sir *Wm.* on a former day, obtained a rule to show cause why the judgment on the verdict, which had been found for the Crown in this cause, should not be arrested. The objection on which the rule had been granted was, that the defendant was charged in the first count of the information on which the verdict had been taken, (which had been filed against him on the 8th *Anne*, ch. 7, sec. 17 *, to recover the treble value of certain smuggled spirits alleged to have been imported by certain

merchants

* Which enacts as follows:—"If any goods liable to payment of duties shall be unshipped, with intention to be laid on land, not only the said goods shall be forfeited, but also the persons *who shall be assisting, or otherwise* concerned in the unshipping of the said goods, or to whose hands the same shall knowingly come, shall forfeit treble value."

merchants unknown,) with having been *assisting*, OR OTHERWISE *concerned in unshipping thereof*; and it was contended, that the imputed offence could not be so laid, because such a charge was double; or if it were not, that it was vague and uncertain, and therefore the count was bad.

Dauncey showed cause. He submitted,—that the words "or otherwise concerned," might be rejected, if injurious to the count; but which, he contended, it was not, because the words of the statute on which it had been framed created only one single offence; and the latter part of the description of it was only a modification of the former, (the assistance,) which alone was the object of the legislature;—and that no other offence could be constituted by those latter words, which could not stand alone and preserve any meaning. "Otherwise" is a relative term; and being "otherwise concerned," signifies being otherwise concerned in giving aid to the offender.

The same answer, he urged, might be given to the other objection, of the uncertainty of the charge; for that the language of the statute and the count could not be mistaken, and that it clearly and exclusively created in the one an offence, and in the other a charge of *assisting* in unshipping; and he cited a case from the Minute-book, of *The King* v. *Thomas Howe*, *Easter* Term 1789, where, on the motion of Mr. *Rouse* in a case precisely similar, this Court ordered it to be referred to the Deputy Remembrancer, to inquire and report whether it had

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had been the constant and uniform practice so to lay the offence; and upon his having made his report, the Court discharged the order. The present form and words of the first count of the information was conformable to the most ancient precedents, and the constant practice of the Court.

The counsel for the defendant was here called on to support the rule; when

He contended, that the section of the statute on which this information was founded had created three distinct offences in terms:—The first was, assisting in the unshipping of smuggled goods; the second, being otherwise concerned therein; and the third, knowingly coming thereby: each of which were kept distinct and apart in the act, by the same disjunctive "or." It might perhaps have been the practice, as it is said, to charge the two first offences in one count; but, on the other hand, it has ever been the practice to charge the last offence in a separate count, which was called the *Devenerunt* count. The practice therefore was both ways; but practice was no reason for holding a count to be good, which was both formally and substantially bad. It is a well-founded rule in pleading, that duplicity in charging an offence is fatal to the count; for each distinct offence must be charged by distinct counts, that they may be met by distinct pleas. In the case of *Rex* v. *Stocker* (a), an indictment for that the defendant *frabricavit seu fabricari causavit*, a bill

(a) 5 Mod. 137. Salk. 342—371.

of

of loading was held naught on demurrer; and the reason given is, that an indictment ought to be certain and positive. So in *Rex* v. *Brereton (b)*, an indictment for a libel *publicavit seu publicari causavit*, was held ill, because, from its uncertainty, no proper defence could be made. And to the same point he cited *Rex* v. *Flint (c)*, *Smith* v. *Mall (d)*, *Rex* v. *Stoughton (e)*, 3 Bac. Abr. Indictment 555; Hawk. b. 2, c. 25, s. 58; Com. Dig. tit. Indictment, G. 3; *Davy* v. *Baker (f)*,—where it was charged, in an action on the statute 2 *Geo.* II. cap. 24, that the defendant did receive a gift *or* reward, and the declaration was held bad for want of sufficient certainty; and the Court there said, that such an objection was not cured by verdict, and might be taken advantage of in arrest of judgment; in that case, too, the words of the statute, which were in the disjunctive had been adopted in the declaration;—*Playter*'s case *(g)*; and *Wood* v. *Smith (h)*. In all those cases, where the alternative is objected to, it still bears some analogy to the offence charged,—as, of "forging or causing to be forged." In the present instance it is not so; for to be "assisting" in an act, or "otherwise concerned" in it, mean necessarily, *ex vi termini*, very distinct things; and where the acts of offence are so, they cannot be blended in the same count, which would perplex and confuse a defendant in the

(b) 8 Mod. 328.
(c) Cas. temp. Hard. 370, and 1 Sess. Ca. 307.
(d) 2 Roll. Rep. 262.
(e) 2 Str. 900.
(f) 4 Bur. 2471.
(g) 5 Co. 35.
(h) Cro. Eliz. 817.

defence

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defence which he should make. That is the result of the case of *Young and others* v. *The King* (*i*), where, in overruling the objection that the defendant was charged with distinct offences in the same *indictment*, which was for a misdemeanor, the Court held that, in the same *count*, it would have been bad.

Then it is clear, that the *assisting*, and *being* OTHERWISE *concerned* in the unshipping smuggled goods, are distinct offences, from the words of the act, taken in their common acceptation. There are, besides, two cases in *Bunbury* on that point, which arose on the very statute now in question, which shew that this Court has so decided. The first is, *The Attorney General* v. *Woodmass* (*k*): that was an information on this statute, and the evidence was, that sixty half-anchors were run and put into private houses, and from thence carried to the defendant's house; but it did not appear that the defendant was present, either at the time of running or removing the goods, but he afterwards paid the cobble-men for running them. Lord C. B. *Pengelly* was of opinion, that that was *a being concerned* within the statute, if the jury were of opinion that the defendant employed the persons to run the goods on his account, and paid them for that purpose; for that these words must have a reasonable effect and import, and must mean something distinct from *assisting*. In the other (*The Attorney General* v. *Lake* (*l*),) also, the offence laid in the information

(*i*) 3 T. R. 98.
(*k*) Bunb. 247.
(*l*) Bunb. 277.

was,

was, that the defendant was *tempore exonerationis opitulator vel aliter particeps*; and, on the objection being taken that a personal presence was requisite, the Lord C. B. distinguished the case from the authority cited; for that, in the principal case, the evidence amounted to proof of the defendant's being *otherwise concerned*, within the meaning of the statute, which must intend something *further* than the *assisting*, or those words would be of no signification at all.

Against the weight of these authorities, and the rules and principles of pleading, the only answer that is set up is, that it has been the practice so to lay the offence,—an usage which at farthest can go no farther back than the 8th of *Anne*, and ought not to be permitted to countervail the established law of the land, and to introduce in practice, what is contrary to principle, that in charging a defendant with a statutable offence, it may be laid with duplicity and uncertainty. In this case too it is more particularly objectionable; for nothing could be easier than to have set forth in terms the acts which constitute the offence, and, on the present occasion, the evidence would have admitted a verdict to have been taken on the *devenerunt* count.

Dauncey, about to reply, was stopped by the Court.

RICHARDS, *Chief Baron*.—The Court are clearly of opinion that the judgment ought not to be arrested

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rested in this case. We do not deny the proposition, that two distinct offences cannot be joined in the same count. Then the question is, whether there are two distinct offences couched in these words or not. The cases cited from *Bunbury* shew that it was the practice in this Court so to lay the offence as in this information, at that time, and that these words of the statute were then considered as constituting one single distinct offence. It seems to me, therefore, that the statute merely contemplated various modifications of the same offence, differing perhaps in the act done, the object of it still being the assistance afforded; but if there were any doubt about it, the universal practice is the best proof of what has been the universal opinion. It is impossible to say that this judgment ought to be arrested on that ground; and, from the case that has been cited from the minute-book, the Court seem to have been heretofore of the same opinion.

GRAHAM, *Baron.*—There is certainly great weight in the argument, that the long established practice of the Court ought to be considered as conclusive of their opinion as to the intention of the legislature. It is clear that it was the practice in Lord Chief Baron *Pengelly*'s day, and he must have come into this Court about the time of passing the act. In a subsequent case, too, it seems that the Court directed a reference to be made to the Deputy Remembrancer, to inquire of and report the practice, which was held to be conclusive; and the Court, after taking time, discharged their order.

But

But the plain sense of the language satisfies me that there are not two distinct offences created by these words; and the same evidence would support the whole. It is quite otherwise in the cases and authorities which have been cited. Evidence of robbery would not support a count for murder, and certainly, wherever the offences are distinct, so should be the counts. In these words the leading charge is the assistance, and the latter member of the sentence would convey no meaning without the first; for 'otherwise,' being a word of reference merely, must have a precedent term: it alludes entirely and substantially to the different modes of doing the same thing,—the various ways of being concerned in rendering assistance.

WOOD, *Baron*, absent.

GARROW, *Baron*.—If there had been any doubt on this case in the Court, I should have abstained from giving any opinion; but the rest of the Court are so decidedly of opinion that this information is right, that I shall express my entire concurrence.

The only plausible ground of objection is, the uncertainty of the offence charged, which, it is said, might embarrass the defendant in pleading; but in this case that objection does not arise, because no man can doubt that the party must know from the language of this charge, that the offence imputed is the rendering assistance in some way or other. That is the substance of the charge. This is very unlike the case of doing or causing to be done.

 And

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And the case of forgery, which has been alluded to, is quite different: this is a charge of being assisting in unshipping goods, which is capable of much more modification than forgery, of bank notes for instance, which is merely the making of the false paper.

And independent of the reason of the thing in this case, on which I have no doubt, after the long practice, and the discussion which took place on the same objection in 1789, the Court cannot now overturn the course of precedents.

Rule discharged*.

* In Lord *Raymond*'s Reports † there is a case on the same point, which was decided in the Exchequer Chamber It was an information in the Exchequer for selling live cattle, *or causing them to be sold*, &c. and judgment for the informer.

The error assigned was, that the information was uncertain, because in the disjunctive. And *Holt*, Chief Justice, was inclined that it was ill for that reason.

But, upon certificate by the Barons *that the course was so in the Exchequer*, and since the jury had found the defendant guilty as to one, judgment was affirmed.

The reporter in the margin notes, "*Sed vide Dougl.* 174. & *Bl.* 810." The latter case so referred to is *Chamberlain* v. *Greenfield*, where the Court held, on demurrer, that a declaration in trespass for forcing open, or causing to be forced open, closets, &c. was sufficient, as one trespass was well alleged, which the jury might distinguish and give damages for alone.

† Wingfield v. Jefferys, vol. 1. p. 284.

REX

1817.

REX (in aid of PARSONS) *v.* FEREDAY and others.

Monday, 19th May.

Sheriff, claiming extra allowance, must apply to the Court, who will refer it to the Deputy Remembrancer to ascertain what he is entitled to.

It is a rule to show cause.

If inefficient cause be shown against such an application, and the Deputy Remembrancer be attended to resist or diminish the sheriff's claim, he is still not entitled to the costs of either the application or the reference.

Vide ante, Vol. I. 205.

OWEN (Sir *Wm.*) applied in last Term on behalf of the Sheriff of *Staffordshire*, for an order to show cause why it should not be referred to the Deputy Remembrancer to ascertain whether any, and if any, what allowance, beyond the poundage, should be paid by the prosecutor of this extent, for his extraordinary trouble in keeping possession of the defendant's goods, &c. seized by him, for a considerable length of time, and, in other respects, founded on the 3d *Geo.* I. cap. 15.

Cause was shown by *Trollope*, at the sittings, when

The Court made the rule absolute.

The Deputy Remembrancer afterwards reported, that a sum of 21 *l.* 13 *s.* was due to the sheriff for extra costs. The Court was moved by Sir *W. Owen* to confirm that report, and that the sheriff should be paid his costs of the application for the allowance, and of the reference to the Deputy Remembrancer, which was opposed by *Trollope*; when the matter being ordered to stand over, was this day brought again before the Court.

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REX (in aid of PARSONS) v. FEREDAY and others.

For the sheriff it was contended, that the prosecutor of the extent, having opposed the motion and attended the reference before the Deputy Remembrancer, had rendered himself liable, and virtually engaged to pay the sheriff's costs, (which by his doing so had been considerably increased,) if the report of the Deputy Remembrancer should be in his favour.

On the other side it was submitted, that the Court could not award the sheriff costs, and particularly as he had claimed more than he was reported to be entitled to.

The report was confirmed; but the Court said, that they did not consider themselves entitled to order the costs to be paid by the party resisting the claim, and refused that part of the motion.

Rule absolute, as to the confirming the Deputy Remembrancer's report only.

CALVERT

1817.

CALVERT *v.* DIGNUM and others.

DAUNCEY, and *Pepys*, moved, pursuant to notice on the part of two of the defendants,—that the decree drawn up by the clerk in Court for the said defendants, bearing date the 21st *November* 1816, might be forthwith passed.

A plaintiff is allowed the vacation of the term in which the decree is pronounced, and the following term, to draw up the decree; but not the vacation of that term.

The motion was opposed by *Lovat*, on behalf of the plaintiff; who, he stated, had served a warrant (dated 24th *April*) to pass the decree, and delivered a copy to the defendants' clerk in Court, when the defendants' solicitor stated that he intended to apply to the Court; and therefore the Deputy Remembrancer refused to sign the decree until the motion should be disposed of, otherwise it would have been passed and signed on the 24th. And he stated the practice of the office of this Court to be, to allow a plaintiff one entire term, including the vacation of *that term*, for preparing his decree; and if it is not then prepared, the defendant is at liberty in the next term to draw it up. In the present case, therefore, he submitted, the plaintiff was in time.

The Court, however, granted the motion: holding, that the plaintiff had one term and a vacation, clear, to draw up the decree; but that the vacation must be that of the term in which the decree is pronounced.

1817.

Biggs v. Stewart.

Same Day.

This Court will now order it to be referred to the Master to compute principal and interest on a promissory note or bill of exchange, &c. (as is the practice in the other Courts) on motion.

Jones, D. F. had obtained a rule to show cause why it should not be referred to the Master, to see what was due for principal and interest upon the promissory note on which this action had been brought, and to tax the costs; and why the plaintiff should not be at liberty to sign final judgment without executing a writ of inquiry of damages; which was this day made absolute, no cause being shown *.

* This motion is noticed here, because the proceeding which is the object of it, has not heretofore been permitted in this Court; and it has frequently been refused, as not being warranted by the former practice.

END OF EASTER TERM.

SITTINGS AFTER EASTER TERM.

57 George III.

GRAY'S-INN HALL.

(*Coram* Richards, Lord Chief Baron.)

1817.

Wednesday, 4th June.

Hitchcock *v.* Giddings.

Where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail: if, at the time of the contract, the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed, and an absolute bond given for securing payment of the purchase-money;—this Court will interfere to rescind the contract, on the equity that the vendor had no interest in the subject-matter at the time of the sale. And that on the ground of mistake, although there has been no fraud from knowledge, or concealment of the fact, on the part of the vendor.

And they will not only order such a bond to be delivered up to be cancelled, but that all interest paid on it shall be refunded.

Note, But the costs were not allowed on either side in such a case.

THE plaintiff by the present bill sought to be relieved, on the ground of fraud, against a bond given by him to the defendant for 5,000*l.* as the consideration for the purchase of the defendant's interest in a remainder in the real estates of *Thomas Millard,* which he had devised by his will to *Elizabeth Millard* and *Anne Wrentmore* for life; remainder to *Anne Wrentmore Colmer* in tail, remainder to *F.* and *T. Vowles* in fee;—and for an injunction to

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restrain the defendant from putting the bond in suit in the mean time, under the following circumstances:—

The defendant, in 1805, had purchased that remainder in fee, of the persons then entitled to it. In 1810 he agreed to sell a moiety of his interest to the plaintiff for 5,000*l.* who, though apprised by his professional adviser of the possibility of the devisee in tail suffering a recovery, which she might do, whereby the entail would be barred, and the remainder destroyed, still insisted on his purchase, (having in the mean time directed a search to be made, to assure himself that no recovery had been suffered,) expressing himself satisfied, and that he thought it worth 10,000*l.* The defendant, on the 10th *May* 1810, executed to him a proper conveyance of his interest; and the plaintiff at the same time signed the bond in question.

In the course of the next month, the plaintiff's solicitor discovered that a recovery had been duly suffered by Miss *Colmer* in *Easter* Term 1808, of which he soon afterwards informed the plaintiff.

The defendant, by his answer, denied all knowledge of the recovery having been suffered when he executed the conveyance; and he proved that the purchase had originated with the plaintiff, and that he had refused to sell him the other moiety on his request. The plaintiff had paid 250*l.* for interest on the bond; which he now prayed might be repaid to him.

Fonblanque,

Fonblanque, and *Wingfield*, for the plaintiff, submitted,—that if the plaintiff were not entitled to the relief sought by the bill, on the ground of fraud; he still had a right, on the ground of mistake, to the interference of the Court, to prevent the ignorance of both parties at the time of this transaction from operating to the prejudice of either, where a contract has not been finally executed. In the present instance the contract has never been completed, for the purchase-money is not at this moment paid. The security which has been given does not conclude the party, or shut him out from relief: on the contrary, it suspends the execution of the contract, and keeps the whole transaction open to let in any equity which will entitle him to claim the protection of the Court. The foundation of the plaintiff's case is, that at the time of the purchase the defendant had nothing to sell.

Martin, and *Heys*, for the defendant, contended, that the parties to a contract completed on both sides, as in this case, were bound by the transaction, unless fraud could be shown, and in the present case it was clear that there was none. The parties were certainly under a mistake; but still, as no fraud or unfair advantage is imputable to the defendant, the Court will not interfere on that ground. If a remainder-man, whose interest is expectant on an entail, chuses to sell that interest to a purchaser, who is apprised that it is subject to the contingency of a common recovery being suffered by the tenant in tail before it vests in possession, he may do so. Such a contract is mere matter of

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of speculation between the parties; and if it is not shown either by the inadequacy of price, (and here it appears the plaintiff himself thought it worth double the sum agreed for,) or other circumstances, that there had been unfair dealing, it would be good, and therefore ought not to be disturbed. The plaintiff, on the contrary, was anxious for the purchase, for he thought that he had the advantage of the defendant. He actually searched for a recovery, which shows that he knew of the possibility of the existence of the objection now taken, and therefore, though he found that none had been actually suffered at that time; he must have known that it might have been suffered the next hour; and he made no further search till *after* the contract was completed, and a security given by a bond, absolute for the security of the purchase-money that ought to have been paid at the time, which is tantamount to actual payment. The security was taken for his ease; not to enable him to come here, with such an application as this: nor was it conditioned to be void, in case a recovery had been suffered. A mere bargain for the sale of a chance must be taken subject to all possible disadvantages, and so little was the objectionable circumstance known to the defendant, that he refused to sell the other moiety on the same terms. That is also a strong argument to show that the plaintiff was well satisfied with his purchase. And as the whole transaction originated with the plaintiff, he cannot be entitled to come into a Court of Equity to seek relief against his own inconsiderate folly, if there were any in the speculation, or to have a fair contract rescinded if it should turn out to be

 disadvantageous,

disadvantageous, by which, if worth any thing, he would be a very considerable gainer.

It was then submitted, that, at all events, the defendant was entitled to costs.

Fonblanque, in reply, urged,—that whatever contingency there was in the bargain, it could only arise fairly on the chance of the tenant in tail suffering a recovery at any time *after* the purchase; and whatever advantage was to be gained by it could only accrue in the event of her not doing so; and that that, therefore, was a strong reason why, if the contingency did not exist at the time of the bargain, the contract ought not to stand, and both parties might be put in the same situation in which they were at the time, without real injury to either. He insisted, that a bond given to secure the payment of purchase-money was not a final closing of the contract, and that notwithstanding all that had been urged for the defendant, this was a proper case for relief.

RICHARDS, *Chief Baron*.—This is certainly a charge of fraud: for it is, that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had; and that thereby he prevailed on the plaintiff to give him this bond. That is, without doubt, what we call a fraud, in Courts of Equity.

Then it is put, that this transaction was an agreement for the purchase of a mere contingency; and if

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if the Court saw that it were, they might not be disposed to assist the plaintiff: for if a man should be foolish enough to make a purchase of such a chance, he must perhaps abide by the consequence of his rashness. But the fact was not so here. Under the will of the testator, the persons making title to the defendant had a vested remainder in fee simple, which would have vested in possession if it had not been in the mean time barred by a common recovery. Both parties, at the time of the contract, treated on the supposition that a recovery had not then been suffered. The whole of the evidence shows that that was the object in contemplation of the purchaser. If no recovery had been then suffered, the defendant had a remainder; if there had, he had no sort of interest whatever. But they agreed for the sale of the remainder, subject to the *subsequent* possible contingency of there being no recovery suffered. Now, if a person sell any estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. A contingency may certainly be sold on speculation, but not such as was sold here. Two parties are not to be allowed to enter into an agreement to deceive each other. But there was not even a contingency sold here: it was not selling an interest, subject to a chance, for the defendant had no interest at all to which a chance could attach.

I must

I must not be told that a Court of Equity cannot interfere where there is no fraud shown. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a Court of Equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land, so sold, to sell? That was precisely the case with the present defendant; and it would be hard, indeed, if a Court of Equity could not interfere to relieve the purchaser.

I am therefore clearly of opinion, that this bond must be relieved against. Bonds are not conclusive, as has been said, though they may be used to show that the party had acted deliberately; but wherever it can be made appear that they were not fairly taken, or that the money was not satisfactorily due, Courts of Equity will order them to be cancelled: for they will not suffer a party to recover on a bond, against which a defendant has no defence at law, although it were given without such a consideration as would entitle the plaintiff at law to receive the money, the payment of which it is given to secure. That is, undoubtedly, the present case. And if more had been done here,—if the money had been paid into Court,—the defendant would not have been permitted to take it out, if the plaintiff could have shown,

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shown, as he does now, that at the time of the sale the defendant had no interest.

Then as to the money which has been already paid;—the same equity which attaches to the bond, must also attach to the interest which has been paid on it; for if an application for an injunction had been made immediately, it must have been granted, and then no interest would have accrued.

As to the costs;—as both parties have acted very foolishly, and are equally to blame, I shall not give costs on either side; although the defendant may have been wrong in resisting so reasonable an application.

The bond must be delivered up to be cancelled; and the interest which has been paid on it by the plaintiff must be refunded by the defendant.

Decree.

(Coram

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(*Coram* RICHARDS, Lord Chief Baron.)

BENNETT *v.* SKEFFINGTON, Baronet, and others.

Thursday, 5th June.

To make out a defence to a bill for tithes, of a composition real, it is not enough to show that the same money-payment has been constantly received in satisfaction of the tithes for a considerable period before the 13th *Eliz.*; but evidence must be given of the existence of an agreement in writing, and made between all the proper parties interested.

Nor will an issue be granted on such evidence; or costs allowed to those of the defendants, who are occupiers.

THIS was a bill filed by the Rector of *Skeffington*, in the county of *Leicester*, against the defendants, as owners and occupiers of lands, &c. within the parish, for an account and payment of tithes.

The defendants, by their answer, set up the defence,—that the lands were covered by a composition real of 40*l.* a year, payable half-yearly, from before the 13th *Eliz.* in lieu of all tithes.

That defence was, in effect, put on this record, to try the question of its validity in the present form; the defendants having failed before, in the case of *Bennett* v. *Neale* (*a*), in establishing a defence founded on the same payment, which they set up as a modus. On that occasion (as appears by the report of the case in *Wightwick*,) the plaintiff destroyed the presumption of the payment having immemorially existed, by showing the origin of the payment by evidence (laid before the Court by the plaintiff in that suit) in a cause between parties in the same character as these, and litigating the right to tithes in the same parish, which was brought to a hearing in the 10th of *Anne*,—that one hundred and fifty years before that time, the then rector

(*a*) Wightw. 324.

made

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made an agreement with the proprietors of a certain inclosure for a composition of 40 *l.* a year, in lieu of all tithes.

The present defence was proposed to be supported by similar evidence, and other testimony of the existence of the same payment for so long a period, and of its having been considered as a composition real.

Fonblanque, *Martin*, and *Dowdeswell*, for the plaintiff, contended, that unless the defendants could carry their case further, and show that such payment had been agreed on as a composition real, by giving in evidence at least some traces of the existence of such a deed, that, although on the former occasion (*Bennett* v. *Neale*) the Court did not actually decide the cause on the question of the defence of a composition real, yet, from what fell from the bench in the course of their delivering judgment, it was to be collected that that defence was untenable on such evidence.

[RICHARDS, *Chief Baron*.—That proposition is too clear for argument.]

Dauncey, and *Boteler*, for the defendants, distinguished the defence set up in the case of *Bennett* v. *Neale*, which was a modus, from the present, which was a composition real. They submitted, that the Court had, on that occasion, expressly guarded against being considered as having decided the question of the validity of the defence of a composition

composition real, and had confined themselves entirely to the question of—whether the payment could be set up as a modus,—which they held it could not, on the very ground on which it is now contended that it is a good composition real; namely, that the origin of the payment was proved to have been an agreement for a composition before the 13th *Eliz.* That being admitted, it must be now presumed to have had all the necessary requisites which go to effectuate such an agreement, although the deed cannot now be produced, or any evidence given of its specific contents.

At all events, the defendant will have laid sufficient before the Court to induce them to grant him an issue, to try the nature of a payment which has existed for more than three hundred years.

[*Boteler* proceeding to read the answer in *Bennett* v. *Neale*, as evidence in this suit, it was objected by *Fonblanque*, that only so much of it could be read as would be necessary to introduce the depositions of the witnesses in that cause as to the payment of 40*l.* a year. And the Court so confined it.]

RICHARDS, *Chief Baron.*—It is impossible to carry this case far enough on the part of the defendants, by the evidence proposed to be read. It amounts only to oral testimony of a parol agreement; and even that is not stated to have been made between all the necessary parties. It is said to have been an agreement between the rector and parishioners only.

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only. The patron and ordinary are not mentioned; so that it was merely personal, for any thing that appears.

But the broad ground on which I proceed is, that there is no evidence offered of any agreement in writing having ever existed. Nothing more is shown than the commencement of this ancient payment, in point of time, and that it originated in an agreement which might have been by parol. Such evidence will not support the defence of a composition real. There must therefore be a

Decree for the plaintiff,—with costs, (except as to *Skeffington* and another, the *landlords* of the occupiers.)

END OF SITTINGS AFTER EASTER TERM.

REPORTS

OF

CASE

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

AND

EXCHEQUER CHAMBER.

TRINITY TERM,

57 GEO. III.

DALLY *v.* CATCHLOWE.

1817.

Friday, 6th June.

The Court will continue an injunction granted to restrain a defendant from proceeding at law, to enforce payment of a promissory note given to the defendant's testator, on the ground that that testator had agreed to accept an annuity in satisfaction of it, and had received part of that annuity on account; although nothing more conclusive had been done by the parties, and no bond or other security given to the grantee, and the whole remained executory.

But they will impose on the party enjoining the action the terms of bringing the money into court.

ROUPELL moved to make absolute the order *nisi* for dissolving the injunction obtained in this cause on the merits.

The

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DALLY v. CATCHLOWE.

The plaintiff had filed the bill to restrain the defendant (an executrix) from proceeding in an action at law commenced against him for the sum of 100*l.*, on his promissory note, given to the defendant's testatrix, and that it might be delivered up. The bill stated that the plaintiff, having 100*l.* the property of the defendant's testatrix, in his hands, had given her the note, to secure that sum to her, with interest; that she and the plaintiff afterwards treated and agreed together, through the medium of one *Cobby*, her agent in the business, that the plaintiff should grant her an annuity of 21*l.* a year for her life, in consideration of the 100*l.*; that after such agreement had been made, and part of the said money had become due, she had requested and received from plaintiff the sum of 2*l.* on account of the said annuity, for which she had given him a receipt, as for so much money received in part of the annuity so agreed to be granted by him to her, and to be secured by his bond, and subsequently another sum of 2*l.*, giving a similar receipt; and that she soon afterwards died.

The answer stated, that the testatrix was very aged and infirm; that if she had received any money from the plaintiff, it must have been on account of interest due on the note; and that, if she had signed or put her mark to any such receipts, it must have been in ignorance of their tenor and contents; and that no bond was ever executed for securing the alleged annuity, nor was the treaty, if any, ever completed, either with the testatrix, or any person on her behalf.

It

It was submitted, that the plaintiff was not entitled to the equitable interference of the Court in a case where the agreement, such as this was, was hitherto incomplete, and merely executory. This was a case very distinguishable from *Mortimer* v. *Capper (a)*, and *Jackson* v. *Lever (b)*; because here all was as yet in treaty, and not even reduced into writing, and nothing conclusive or binding had been done; for no bond had been given, whereas some such instrument should not only have been executed but enrolled; or if what had been done were sufficient, that would then be a good defence at law. *Quâcunque viâ*, therefore the plaintiff had no equity; and if this sort of executory agreement were sufficient ground for such an application as the present, the annuity acts, and all the formalities so strictly required by them, would be frustrated by being in all cases liable to be evaded by equitable construction of such transactions as these, and the admitting in evidence such receipts as were tendered to affect the testatrix, who might herself, if living still, have enforced payment of the note.

Newland, contrà, contended, that the agreement being merely executory, and nothing effective having been done under it, the plaintiff had no means of defending himself at law, whereas the transaction had gone far enough between the parties to entitle him to the interference of the Court on the equity of his case, as supplied by the circumstances brought forward in the bill, and not negatived by the owner.

(a) 1 Bro. Ch. Ca. 156. (b) 3 Ib. 605.

 The

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The Court, after expressing some doubt, ordered the injunction to be continued, on the terms of the plaintiff bringing the money into court.

Order *nisi* discharged.

THE KING v. HORTON.

Saturday, 7th June.

Rules at *Nisi prius* by the Lord Chief Baron, that a person having entered into a bond, with sureties to the Crown, is not an admissible witness in a *scire facias* against the surety, to prove that he had not broken the condition.—*Sed Quære?* (the principal having been released by the surety.)

JERVIS obtained a rule to shew cause why the verdict which had been given for the Crown in this case, at the last sittings for *Westminster*, should not be entered for the defendant, or a new trial had. The proceedings were by *scire facias*, on a bond entered into by the defendant to the Crown, under the 38th *Geo.* III. ch. 89, as surety for one *Garrett*, a fish-curer, conditioned, that if the salt, which he should receive free of duty, shall be really and truly employed, spent and consumed in curing and preserving fish, or delivered to some other fish-curer or fish-curers, for the purpose of curing and preserving fish, and if no such salt shall be employed, used or disposed of in any other manner or way; and also, if *Garrett* should yearly deliver to the proper officer of Excise whose duty it shall be to receive the same, a true and particular account, specifying the exact and true quantity of salt which he shall have had or received in his custody, free of duty, then the bond to be void.

In the replication several breaches were assigned, stating,

stating, that *Garrett* had received into his custody and possession, free of duty, two thousand bushels of salt, for the purpose of preserving and curing fish, and that the said salt was not, nor was any part thereof really and truly employed, spent or consumed in curing or preserving fish, or delivered over to any other fish-curer or fish-curers for consuming part of such salt in another manner than, &c.—and for delivering part over to certain persons by name, not being, &c.—On which, issue was joined.

It was proved at the trial that some of the salt had been delivered over by *Garrett*, to one *Hacker*, a grocer, and to destroy that case *Garrett* himself was called by the defendant, by whom he had previously been duly released from any right which the defendant might have to recover against him the amount of the verdict which should be found for the Crown in the present case, to prove that he had duly accounted for all his duty-free fishery salt.

The counsel for the Crown objected to this man's evidence, on the ground of his being directly interested in the result of the trial, as he was the principal in the bond on which the defendant was proceeded against, as his surety, and on which he himself might still be sued. They also submitted, that a verdict in the present case for the defendant might be used in evidence in a similar proceeding against the proposed witness, and that therefore he

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he could not be admissible unless released by the Crown as well as by the defendant.

To that it was answered, that the release of the defendant removed the objection of interest, in the result of the present trial; and that a verdict for the defendant, in this case, would be *res inter alios acta*, and would not be used in any proceeding by the Crown against *Garrett*; and the case of *Bent* v. *Baker* (a), was cited to the point; that *Garrett* having been released by *Horton*, had no interest in the result of this cause, and was therefore a competent witness for the defendant; but the Lord Chief Baron, after some consideration, rejected the witness.

Jervis now moved to enter the verdict for the defendant, or that there might be a new trial, on the ground of the testimony of that witness having been rejected.

The case of *Bent* v. *Baker* was again cited, and relied on as an authority directly bearing on the present, where one underwriter on a policy was admitted a witness in favour of other persons who had subscribed to the same policy; and that, because being released, he had no manner of interest in the cause. For the same reason, therefore, a principal in a bond may be called to prove the condition performed in favour of his surety, by whom he has been previously released, whereby all

(a) 3 T. R. 27.

right

right of action over against him is extinguished? The case of *Birt* v. *Kershaw* (b) was also cited, as affording another instance somewhat analogous, in the decision that an indorser of a note is a competent witness in an action against the drawer, to prove that he (the indorser) had satisfied the note, having received money from the drawer for that purpose. And if it should be contended that that point has been otherwise ruled in the case of *Jones* v. *Brooke* (c), the circumstance of there having been no release given in that case would completely distinguish it from this.

The rule is, that the sort of interest which excludes a witness must be certain, direct, and immediate, in the event of the suit; for whatever contingent or collateral benefit may result to the witness from a verdict obtained on his testimony, it can only affect his credit, and affords no ground for rejecting his evidence altogether.

Then adverting to the principal objection taken to the witness at the trial,—that by defeating this proceeding against the defendant he would be furnishing matter of proof for himself in any future proceeding against himself by the officers of the Crown on the same bond;—it was submitted that that was not so; for as the record of a verdict recovered by the defendant, could not be used in evidence by the witness in any proceeding against himself, he was not furthering his own case by

(b) 2 East. 460. (c) 4 Taunt. 464.

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giving his testimony in favour of the defendant; for it would, in such a case, be *res inter alios acta.*

On that point, a case of *Hart* v. *M'Namara* and another *, was mentioned, as one in which the Chief Justice of the Common Pleas had very recently so held at Guildhall. That objection being removed, there remains no reason why the evidence should not have been received, leaving it to the jury to give what credit to the witness they might think his testimony, as affected by the situation in which he stood, deserved.

Rule granted.

The rule was afterwards discharged without argument, no one appearing on the part of the

* HART and another v. M'NAMARA and another.

[*Tried before* GIBBS, *Chief Justice, in London, Sittings after Easter Term* 1817.]

That was an action for the price of rum sold by plaintiff. The defence was, that the rum was adulterated. To prove the adulteration, the record of condemnation of the rum was offered in evidence; and to connect the plaintiffs with the cause of condemnation, a record was offered in evidence of proceedings by the Crown against the defendant for penalties, in which defendant was convicted.

Gibbs, Chief Justice held, that the record of condemnation was admissible, being *in rem*, but he refused to admit the record of conviction for penalties, stating, that as it was *in personam*, it was not evidence in any case where the parties were different.

defendant

defendant to support it: but the Lord Chief Baron intimated, that he had not as yet been able to discover any ground for altering the opinion which he had formed at the trial.

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MEMORANDUM.

Tuesday, 10th June.

THE Court desired that it might be understood that the rule of Easter Term, 56 Geo. III. respecting the order of motions for justification of bail * would in future be peremptorily enforced; and they announced, that as very much inconvenience had been experienced by the desultory manner in which such motions had hitherto been made, they would not henceforth admit bail to justify, unless the justification were moved, in conformity with that order, *at the sitting of the Court.*

* *Vide ante*, Vol. II. p. 327.

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IN THE EXCHEQUER CHAMBER.

[*Coram* RICHARDS, *Lord Chief Baron.*]

WILLIAMS, Clerk, *v.* PRICE and others, and the DEAN and CHAPTER of WINCHESTER and another.

Tuesday, 10th June,

The word "gardens" in an endowment will not give a vicar the tithe of articles of modern introduction, although they might have been originally usually grown only in gardens.

So also the word curtilage.

"*Alteragium*" is a word explicable only by the usage shown to have been established under it.

THE plaintiff filed this bill as vicar of *Romsey, Hants,* against the defendants, occupiers of lands in the parish, and the impropriate rector, for an account of small tithes.

The subject of his claim was, the tithe of turnips and potatoes of field produce*, as being included within the terms of his endowment, under some or other of the following words: "gardens, curtilages, and offerings and oblations at the altar of *St. Lawrence**."—The endowment of 1322 (which was read) was special, giving the vicar tithe of flax, hemp, apples, pigs, geese, cows, milk, cheese, calves, pullen, honey, pigeons,

Usage is the broad ground of presumption in favour of the vicar's endowment, and if there be an endowment in proof, expressing of what tithes his vicarage shall be endowed, if any tithes received by the vicar be not among them, a subsequent endowment will be presumed. Vide *Cunliffe* v. *Taylor, ante,* Vol. II, p. 329.

A rector is entitled to an issue as matter of right in cases where he sues only.

A rector ought not to be made a defendant in a vicar's suit, for an account of small tithes charged to be withheld by occupiers, on a claim by the rector.

* *Vide Kennicot* v. *Watson, ante,* Vol. II. p. 250.

handicraft

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handicraft trades, gardens, curtilages, eggs, and also confessions, funerals, and legacies given by the dead, except only the legacies and heriots given to the chancel and buildings of the same prebendal church, and also all that portion of tithe hay, *viz.* two cart-loads of hay out of the meadow called *Small Mead*, and also all offerings and oblations at the altar of *St. Lawrence*, or any where else in the same church.

[The cause came on upon admissions, and it was admitted that the vicar had for upwards of 50 years received money payments in lieu of tithe of hops, and had also received money payments for several years, in lieu of tithe of potatoes grown in fields; thus establishing perception of other tithes than were enumerated in the endowment.]

The defence set up by the answers was, in substance, that the impropriate rectors were entitled to the tithes of young trees and shrubs growing in nursery grounds, of ozier or withy beds, hops, turnips, seeds, clover, and other grass seeds growing in fields, and to the tithes of potatoes and turnips growing in fields.

The defendants denied that the vicars had ever been in receipt of all small tithes, but admitted perception of some small tithes in part.

5th June.

Martin and *Wray*, for the plaintiffs, submitted that the words of the endowment were sufficiently comprehensive to give the vicar all small tithes, or at

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at least that they were equivalent to a general endowment of pulse, and all articles of garden produce, wherever grown and in whatever quantity; and for that they cited the dictum of Lord *Hardwicke*, in *Smith* v. *Wyatt (a)*, and *Burn*'s Ecclesiastical Law *(b)*. If, however, the endowment of gardens should fall short of an endowment of all garden-stuff properly so called, the word, curtilages—a word of more extensive signification (meaning fields adjoining the dwelling-house)—had been introduced into the endowment, which would supply that deficiency; and the import given to that word in *Cowell*'s Interpreter, supports that suggestion. The word "*alteragium*" also may be called in aid of the proposition; for although it might have originally meant only offerings made by the communicant in consideration of altar duties, it has been held to cover various species of small tithes.—Whenever any titheable article is given, all things *ejusdem generis* follow it: and they contended, that such a liberal construction of those words in this endowment was borne out by the usage in evidence in this suit.

Dauncey and *Newland*, for the defendants, relied on the common-law right of the rector, which, they insisted, was not infringed or diminished by any of the terms used in the present endowment. The word "gardens" can only give the tithe of things grown in gardens as gardens, and the same may be said of curtilages, whatever may be the meaning of that

(a) 2 Atk. 364. (b) Vol. III. 409.

word;

word; and so of offerings at the altar.—As to the usage, the perception of the articles in dispute, which had been offered in proof of it, was of very confined extent and recent date, and such as was most likely to have been had behind the back of the rector, and therefore cannot prejudice his claim.

Adv. vult.

RICHARDS, *Chief Baron*, now gave judgment.—On consideration of this case, there must clearly be a decree against the defendant; for he admits that some indefinite titheable matters have been rightfully received by the plaintiff as vicar.—Now, if those tithes were not mentioned in the original endowment, we must presume, from such perception having been acquiesced in, that there must have been a subsequent endowment of those articles. But I am not of opinion that the word "gardens" would of itself carry garden-stuff, or things originally grown in gardens, if grown elsewhere: and the same may be said of the word "curtilage." As to the precise meaning of the other word "*alteragium*," it cannot at this time be exactly defined, and we know not with any degree of certainty what it means; and therefore we must have recourse to the safest criterion, which is the usage in each particular instance.

Now the short ground on which I decide this case, whatever may be my opinion of the construction of the terms of this endowment, is the usage; for on evidence of usage the construction of endowments must often depend; and the Court is bound to presume, where usage is proved, that such usage is

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is founded on some subsequent endowment. That is the rule of law and the practice in these cases. I had at one time doubted whether I should not give the rector an issue, but there certainly must be a decree against him.

The evidence of usage calls for a decree against him; for the vicar is proved to have had perception of the small tithes now claimed, while on the other hand there is no countervailing evidence of any such perception by the rector. If I were on a jury, I should feel myself bound to decide in favour of the vicar; and I am equally bound by my oath to do so on the evidence laid before me as Judge in a court of equity.

Account decreed.

It was then submitted, on the authority of *Garnons* v. *Barnard*, that the rector was in all events entitled to an issue; but by

The *Lord Chief Baron*—That is only where he sues; and in point of practice the rectors ought not to have been made a defendant party in this suit, nor could I make any decree against them. Therefore the bill must be dismissed as to them; but (it being suggested that the adverse claim set up by the rectors made it necessary to include them in the suit) let it be without costs.

162 q. 608

IN THE EXCHEQUER CHAMBER.

[*Coram* RICHARDS, *Lord Chief Baron.*]

36 h 371 — 3 Beav. 362 — 1817.

HAMIL and others *v.* STOKES and others.

Tuesday, June 10.

2 Smyth 1 L.R. 16 Beav 106 / Coll 597

In a case—where an attorney has prevailed on a young man, about to be admitted, to become his partner in business for a certain term, and to pay him, as a consideration, a considerable sum of money, a part to be paid on the execution of the articles, and the remainder by yearly instalments—if during the term the attorney sue out, in character of petitioning creditor, a commission of bankruptcy against the person so having become his partner, whereby, on his being declared bankrupt, the partnership is necessarily dissolved:—The Court will not only not permit him to sue for the instalments accruing due afterwards, but will order him to refund the money already received by him in consideration of the partnership, except as far as shall be commensurate with the period of the actual duration of the partnership.

So, also, if the attorney has himself since become bankrupt, and assignees chosen.

Nor will the Court allow a *boni fide* creditor, to whom the bond to pay the instalments has been assigned as a security for his debt, to put it in suit, because all equities follow the bond in such hands, and they will order the bond to be delivered up to be cancelled.

In such a case, the Lord Chief Baron allowed the plaintiff costs, and refused them to all the parties actually defending the suit.

THE plaintiffs in this case were, *Hamil* (a bankrupt), *Roberts* (his surety in a bond, which was the subject matter of the present suit), and *Browne* and *Jane* (the assignees of *Hamil* under his commission.)

The defendants were, *Stokes* (also a bankrupt)—*Biss*, and *Longmore*, (the original assignees under his commission); *Price* (a creditor of *Stokes*, and assignee of the bond in question, for securing his own debt,) and *Rossiter* and *Baker* (the acting assignees under *Stokes*'s commission.)

The bill and answers stated and admitted the following facts:—That in *January* 1808, *Stokes* proposed to, and agreed with *Hamil*, a young man about

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about to be, but not then admitted an attorney, that he should become his partner in his profession of a solicitor and attorney, for a term of five years, in consideration of which, *Hamil* agreed to pay *Stokes* 1,050*l.*; 500*l.* to be paid down, and the remainder by yearly instalments of 100*l.* with interest and to be secured by the joint bond of *Hamil* and plaintiff *Roberts*. Articles were executed between them accordingly, and *Hamil* procured himself to be admitted an attorney on the 4th *May* 1808, from which time the partnership commenced. On the 1st *January* 1809, *Hamil* paid *Stokes* the first instalment. On the 24th *June* following, *Stokes* issued a commission of bankrupt against *Hamil* (*Stokes* himself being the petitioning creditor) for a debt of 188*l.* 6*s.* 7*d.* under which he was declared bankrupt, and the other plaintiffs were chosen assignees of his estate and effects, and the partnership was in consequence dissolved. *Price*, to whom the bond had been assigned, had commenced an action on the bond, in the name of *Stokes*, for the remaining instalments. *Stokes* was soon afterwards himself declared a bankrupt—the assignees under his commission had been removed, and the defendants, *Rossiter* and *Baker*, appointed in their stead.

The plaintiffs, therefore, prayed that the defendants, *Rossiter* and *Baker*, the new assignees, should be decreed to deliver up the said bond to be cancelled, and to pay back the said sums of 500*l.* and 100*l.* with interest,—that the plaintiffs might be admitted creditors, under the commission of bankruptcy

bankruptcy issued against *Stokes*, for the said sums, making such abatement as ought to be made therefrom, and for an injunction as to *Price*'s action at law.

Dauncey and *Wyatt*, for the plaintiffs, submitted, that as *Stokes* had himself put an end to the partnership by his own act, he had no right to retain the consideration of that agreement, of the benefit of which he had thereby deprived the plaintiffs. By making the partner a bankrupt, the consequence of which was necessarily a dissolution of the partnership, so that he had himself put it out of his own power to perform his part of the contract, which was the sole consideration of the bond that had been entered into by the plaintiffs. If the effect of the dissolution of the partnership should be held to operate against *Hamil*, it ought also to operate against *Stokes*. It was submitted that the present case was analogous with that of master and apprentice; where a master, who should vacate the indentures by his own act, would not be entitled to retain the premium.

Martin, *J. Martin*, *Treslove*, and *Beames*, for the defendants, contended, that there was no analogy between the case of master and apprentice and that of partners, or if there were, it would be in favour of the defendants, according to what was said by the Master of the Rolls in the case of *Hall* v. *Webb* (a), that gross misconduct would be a forfeiture of the premium by the apprentice. Their re-

(a) 2 Bro. C. C. 78.

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lative situation is however different, inasmuch as between partners there is neither submission due on one hand, or authority given on the other, for a man has not a controul over his partner as a master has over his apprentice—that the vice of the plaintiff's argument was, that the act which caused the dissolution of the partnership, was the act of *Stokes* in suing out the commission; whereas, in fact, it was the act of bankruptcy itself, and the insolvency of *Hamil*, which was properly the cause of that consequence. It was, therefore, his own act that produced the dissolution, by compelling *Stokes* to have recourse to the measure of resorting to the commission in self-defence; and there is nothing in the circumstance of *Stokes*'s being his partner which should deprive him of the right of protecting himself against the ruinous conduct of *Hamil*, by taking such a step. A partnership does not preclude one partner from the right of suing out a commission against another; and it is the act of the law, and not of the petitioning creditor, which dissolves the partnership between parties in such a situation. To give the partner an equity in such a case, some fraudulent motive or conduct should be proved; but there has been no such thing here. The contract between the parties has been in no respect broken by *Stokes*; but *Hamil* himself has by his own improvident conduct alone, deprived himself of the benefit of the agreement, a conduct which *Stokes* had no power either to cause or check. It is probable even that *Stokes*'s own bankruptcy might have been occasioned by the conduct of *Hamil*, who, during the partnership, had it in his power to have involved

volved *Stokes*, but the law itself interferes to protect him by the effect which it has declared shall be the consequence of the bankruptcy of a partner. As well might it be said that a person who has committed a felony, for which his partner might have been compelled to prosecute, or give evidence against him, would be entitled to come into a court of equity and seek to be repaid the consideration-money of his agreement, on the ground of the consequent dissolution of the partnership having been effected by the act of the partner so becoming prosecutor or witness. If, indeed, either party had died, his death might have given the plaintiff an equity to recover back the money which had been paid; but this case bears no resemblance to such a state of things.

Another difficulty arises from there being an apportionment required to be made (because during some part of the term the partnership subsisted) if there should be a decree for the plaintiff; for the Court have no means of ascertaining how much ought to be repaid, and how much retained, of the 600*l.* which has been paid; and at all events *Stokes* would be entitled to a set-off, as there cannot be a doubt that he had a right to receive the money originally.

On the whole, therefore, without proof of bad faith or fraudulent conduct on the part of the defendant *Stokes*, the plaintiffs cannot make out a case for the interference of a court of equity, and their bill must be dismissed.

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RICHARDS, *Chief Baron.*—I see no reason for altering my original opinion in this case. If this had been a matter purely between the plaintiff and the defendant *Stokes*, there could not have existed the least doubt on the subject. It is on *Stokes's* solicitation that this young man, who was not at that time an attorney, agrees to enter into partnership with him as soon as he shall be admitted, and having so applied to him for that purpose, he prevails on him to pay him, as a consideration, 1,050 *l.*, 500 *l.* to be paid on the execution of the articles, and the remainder by yearly instalments. The partnership was to have continued for five years, but in fact, it lasts only thirteen months at the outside—the partnership is then dissolved by operation of the commission which was sued out by *Stokes*, and thereby all further benefit of the contract was entirely lost to the young man.

If that had been the effect of accident, it would have been much to be lamented; but here *Stokes* admits that he himself procured the commission to be sued out, and by that means he himself it was who put an end to the partnership. Now in morality such conduct amounts to a very grievous offence, and if *Stokes* had been the only party concerned, no honest man could hear the transaction stated without great indignation; but, however, as far as *Stokes's* creditors and assignees are concerned, they have certainly done no more than they were fairly entitled to do for the protection of their own interest. One of the creditors has set up an assignment for a previous debt due to him from *Stokes*;

But

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but he must take it, subject to whatever equities would affect the original security in the hands of *Stokes*. On the whole, a court of equity, so far from being a benefit to the country, would be an enormous nuisance, if it could not give a relief in such a case as this, to prevent a man from taking an unfair advantage of his own act, which, under pretence of being for the good of another, is made to operate to his prejudice.

The injunction must, therefore, be continued, and the bond delivered up to be cancelled; and it must be referred to the Deputy Remembrancer to enquire how much of the money received by *Stokes* ought to be refunded; on the other hand, the assignees of *Stokes* should be permitted to prove the debt due from *Hamil* to *Stokes*, on which the commission was founded, but an allowance ought to be made for the time of the actual duration of the partnership. The plaintiffs should be let in to prove the balance, and the amount of their costs under the commission; but the defendants, *Longmore* and *Biss*, *Stokes*'s original assignees, must be allowed costs for the time of their removal to the hearing of the cause.

Decree accordingly,—concluding with declaring, that "the Court does not think fit to give any costs to the defendants, *Stokes* or *Price*, or *Rossiter* and *Baker*, in respect to their defence of this suit."

IN THE EXCHEQUER CHAMBER.

(*Coram* RICHARDS, *Lord Chief Baron.*)

1817.
Wednesday, 11th June.

HANSON *v.* HANSON.

It is not a good plea to a bill filed by one residuary legatee (to whom, with others, the debts due from a concern in which the testator had been a partner with one of his legatees, had been bequeathed,) against the others for an account of monies due from the partnership to the testator, charging the defendant with owing the concern various sums of money, having possession of the partnership books; that all the monies due from the partnership to the testator at the time of his death consisted wholly of money lent by him to the defendant; and that (as the fact was) the testator had by his will forgiven and released the defendant from all monies lent and advanced by him during his life-time, the release by the devise being treated as referring to specific sums advanced independently of the partnership debts.

THIS was a bill by one residuary legatee against the executors and the other residuary legatees, for the usual accounts, and to have the trusts of the testator's will carried into execution, under the decree of the Court; and also calling for an account of all monies due to the testator at the time of his decease, from the partnership which existed between him and the defendant *Benjamin Hanson*, or from the said defendant *B. Hanson*.

The bill, among other things, stated, that the testator *B. Hanson* had for several years preceding his decease carried on the business of an orange merchant, with the defendant *B. Hanson* his son; —that no final settlement of accounts ever took place between them, but the testator *B. Hanson* always had a considerable sum of money belonging to him remaining in the business up to his death, and that there were divers sums of money due to him from the partnership concern which had never been paid; and that the testator also lent and advanced

to

to the defendant *B. Hanson* divers sums of money for his own use, which remained due from the said defendant to his father at his decease.

The bill also stated the will of the said testator, whereby he gave to his executors the residue of his property to pay the interest to his wife for her life, and after her decease to transfer one-third of the residue to the said defendant *B. Hanson*; one other third to plaintiff, and the remaining third to plaintiff's children; and the testator by his said will also forgave and released unto his sons *Benjamin Hanson* (the defendant) and *Joseph Hanson* the plaintiff, all such sums of money as he had thentofore advanced or lent to them or either of them; and the bill, after calling upon the executors to set forth the usual accounts of the testator, charged the defendant *B. Hanson* with having possessed all the partnership books and accounts, &c. and called on them to set forth an account of all monies due to the said testator, at the time of his decease, from the partnership.

To this bill the defendant *Benjamin Hanson* put in a plea and answer; and as to so much of the bill as related to the said partnership, and as called for the partnership accounts, (except a sum of 174*l.* 0*s.* 6*d.* thereinafter mentioned,) he pleaded that *Benjamin Hanson* the testator, in his life-time advanced and lent to the defendant all the money which at and before the date and execution of his will had become and was due to him from the partnership between the defendant

 and

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and the testator, and also all and every sum and sums of money which had become and were due to him from the defendant himself, and at the date and execution of his will;—that the testator made his will, and thereby forgave and released unto the defendant all such sums of money as he had theretofore advanced or lent to him, and that he thereby appointed the defendant and *Samuel Lomell* executors. The plea then stated the death of testator, and that his will was proved by his executors, and that the defendant *Hanson* had duly assented to the release in the will contained of all sums of money advanced or lent to the defendant by the testator, as mentioned in the will. And then the plea averred, that there never was any sum of money advanced or lent to the defendant by the testator after the date and execution of his will, save the sum of 174*l.* 0*s.* 6*d.*, being a sum received since the dissolution of the said partnership by the said defendant, for the use of the said testator, from the assignees of the said defendant's brother *J. Hanson* in the bill named; and that save and except the said sum of 174*l.* 0*s.* 6*d.* there never was any sum of money whatsoever due and owing to the said testator from him the defendant, or from the said partnership, or partnership concern, other than such as had been advanced or lent to him the defendant by the testator before the date and execution of his said will.

And as to the remainder of the bill he put in an answer.

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The Court were of opinion that the plea was bad; that the common understanding of the clause in the testator's will was, that he meant to limit it to certain specific sums advanced or lent by him to his sons, but that it could by no means be made to extend to all the monies arising from the partnership, and they overruled the plea.

Roots for the bill.

Sidebottom for the plea.

IN THE EXCHEQUER CHAMBER.

(Coram RICHARDS, *Lord Chief Baron.)*

WALTER, Clerk, *v.* HOLMAN and others.

Wednesday, 11th June.

21 Geo 3 J

THE plaintiff in this suit was vicar of *Abbotsham*, in the county of *Devon*. The bill was filed against certain occupiers of lands in the parish, for an account of hay and small tithes.

Money payments in lieu of tithes, although made as far back as living memory can reach, held not to be moduses where many of the witnesses state that such payments were apportioned by reference to the poor's rates.

Nor will an issue be granted to try the character of such payments so described by the witnesses' depositions.

The vicar's books are evidence to shew, that the money payments received in lieu of tithes are founded on, and regulated by, a criterion not in existence beyond legal memory—*e.g.* the poor's rates.

The

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The defendants admitted the vicar's title, but set up a great number of money payments as farm moduses.

In support of that defence, evidence was given, that the vicarial tithes had been accustomed to be paid in money for a great length of time, carrying it as far back as living memory; but a great number of the witnesses stated that those payments were made in a proportion of 6*s.* in every 10*l.* *according to the poor's rate* charged upon the several farms and lands in the parish.

To meet the defendant's case, the plaintiff gave in evidence the usual ancient documents to prove that the payments set up could not be considered as moduses, consistently with the value of the vicarage, as estimated by those documents since legal memory, and produced the vicar's books to shew that the payment was not uniform, but regulated by the poor's rate.

[The production of these books for that purpose was objected to, as not being evidence either of the poor's rates being the criterion by which the money payments were regulated at any time, or of the amount of those rates; but that objection was ultimately overruled.]

Dauncey and *Boteler*, for the plaintiff, contended, 1st, That the usage in evidence was insufficient to establish the defence of moduses, inasmuch as the payments were too rank to be considered

considered as having been made before legal memory; and 2dly, That the fact of their being regulated by the criterion of the poor's rate, which was of comparatively modern origin, was absolutely conclusive against their existence as moduses. They cited the case of *Startup* v. *Dodderidge (a)*, as establishing that payments regulated by rent or value cannot stand as moduses, much less could they, when regulated by a poor's rate, which may not perhaps be founded on the true value of the lands rated.

Martin, *Wyatt* and *Roupell*, for the defendants, submitted, that the objection taken on the ground of the poor's rate being unknown till after legal memory, went merely to the form of the testimony and the language of the witnesses, for that that was not the way in which the moduses had been put on the record; and they submitted that the testimony of the witnesses, (some of whom moreover had only referred it generally to 'a rate' which might have been the church rate,) was wholly extrinsic to the fact, as stated in the answer, and ought not, in the first instance, to be allowed to defeat the defence pleaded;—that it was common for witnesses to use, in words, modern *criteria* in proving the amount of an ancient payment,—and that these payments had been proved to have been uniform, whereas the poor's rates must necessarily have been fluctuating and variable. It may, after all, be only the understanding of those few witnesses who so state it, and in

(a) 2 Gw. 587.

that

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that they may, in point of fact, be mistaken, and their mistake as to the supposed criterion by which, in their opinion, the payment had been regulated, ought not to prejudice the defendant's right to an issue,—that, at all events, the proof of these payments for so long a period, while no tithes have ever been paid in kind, would entitle the defendants to an issue, to try whether they were moduses or not. Against such proof of continued money payments having been for so long a time received and acquiesced in by successive vicars, the evidence of the ancient documents loses all weight. So it was held in the very recent case of *Jee* v. *Hookley (b)*. The defendants, therefore, (they contended) were at least entitled to an issue, to try the real character of the money-payments; and they submitted that the Court should, in a case of this sort, direct a further inquiry.

RICHARDS, *Lord Chief Baron*.—(Having stated the pleadings and commented on the evidence.) It is quite clear that the vicar is entitled to the tithes, either in kind or by a modus, and therefore the sole question here is, whether the sums which have been hitherto paid by the defendants in lieu of tithes are moduses? If they can prove the immemoriality of the payments, they are entitled to succeed here and elsewhere; but that is incumbent on them. Thinking, however, as I do, that they have not done so, and that the plaintiff is therefore entitled to a decree, I give my opinion instantly.

(b) Ante, p. 87.

[His

[His lordship then expressed himself in terms of disapprobation as to the mode in which the defence had been proceeded in, and of the great and unnecessary length of the depositions, the greater part of which, he said, were not evidence.]

I have attended the more carefully to those depositions lest my feelings should mislead me, and having said that the plaintiff is entitled to succeed unless the defendants can support their moduses by evidence, I am of opinion that they have produced nothing like evidence of the payments being of that nature; on the contrary, such evidence as this, that the payments were in proportion of 6*s.* for every 10*l.* of the poor's rate, is direct proof that they were not moduses.

With respect to the acquiescence of the vicars, that does not weigh with me a feather against their right, under circumstances like those in evidence in this case, where it is proved that the last incumbent was disinclined to assert his claim when threatened with being harassed by the landed proprietors; no doubt many bad moduses have been established by reason of the vicar's inability to contest his claim.

Now the plaintiff's case here is founded upon the evidence that the payments made to him in lieu of tithes, were regulated by the poor's rates. The parol testimony proves that, and it is confirmed by the vicar's books, which for that purpose are undoubtedly evidence; they shew that the money-payments

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payments received in lieu of tithes are founded on the poor's rate, and it is notorious that poor's rates were instituted long subsequent to the time of legal memory, and that is quite sufficient to shew that these payments are not moduses. I must, therefore, either reject all the evidence, or decree for the plaintiff.

Account decreed, with Costs.

IN THE EXCHEQUER CHAMBER.

(Coram RICHARDS, *Lord Chief Baron.)*

DAVIES *v.* DODD.

Thursday, 12th June.

The indorsee of a bill of exchange which has been lost, has a remedy against the acceptor by bill in equity to compel payment, and that although he might have recovered on the bill at law, his equity being founded on the want of power in a court of law to impose terms on the plaintiff of giving the defendant security against the forth-coming of the bill, which would have been good ground for an injunction to restrain such an action.

Nor is it any answer to such a suit that the bill of exchange was a mere accommodation bill; that the plaintiff might have applied before; or that the drawer has since become insolvent.

The plaintiff is not bound in a court of equity to institute such a suit within any particular period.

It is not necessary to make the drawer a party.

THIS bill, which was filed in Easter Term 1813, prayed for relief, and that the defendant, who was the acceptor of a bill of exchange, dated 4th *March* 1812, might be decreed to pay to the

plaintiff

plaintiff (the indorsee) 96*l.* 9*s.* the amount of the bill.

It had been drawn by a person of the name of *Allen*, and made payable to his order, and he had endorsed it to the plaintiff for a valuable consideration. The bill stated that the plaintiff had proposed to give the defendant an indemnity against any demand which might be made on him in respect of the bill.

It was proved that the bill had been lost by the plaintiff's agent, and had been frequently advertised by the plaintiff, offering a reward for its recovery, without effect.

The defendant stated in his answer, that no other indemnity had been offered to him than the bond of the plaintiff, which he (the defendant) had rejected, as the plaintiff was in insolvent circumstances; but that, if a sufficient indemnity had been offered, he would have accepted it, and would have paid the bill.

Trollope, for the defendant, objected in *limine* that the drawer ought to have been made a party, more particularly as the defendant had accepted the bill solely for his accommodation, and without any consideration or value received, as was known to the plaintiff when he took it from the drawer, and that he had not kept any copy of it.

Martin and *Parker*, for the plaintiff, submitted, that

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that *Allen* (the drawer) was not a necessary party, nor could the plaintiff have obtained any decree against him if he had made him a defendant, nor could the Court have made a decree in that case, as between *Dodd* and *Allen* (the indorsee and drawer.) But the Chief Baron determined that the drawer was not, under the circumstances, a necessary party.

It was then contended that proof of the loss of the bill entitled the plaintiff to the relief prayed.

Trollope, on the other hand, insisted, that the plaintiff's remedy was at law on the case made out by himself; for, from the decision in *Long* v. *Bailie (a)*, it was clear that he might have succeeded in an action to recover the amount of the bill. He submitted, also, that the plaintiff was now too late in his application, for his *laches* had already shut out the defendant from any chance of recovering over against *Allen* the drawer (who had since become insolvent) as he might perhaps have done before. If, however, the plaintiff were entitled to the relief prayed, it could only be on his giving the defendant an efficient indemnity, by good security, against all future demands in respect of his acceptance of the bill, which the plaintiff had never yet offered to do, the only indemnity proposed being the single bond of the plaintiff himself, which, being his personal security merely, could not be considered sufficient, even if he were in

(a) 2 Camp. 21.

good

good circumstances. The plaintiff has, therefore, no remedy in equity, and if he had, he is bound to give the defendant ample security.

RICHARDS, *Chief Baron.*—It does not become me to say whether the plaintiff has or has not any remedy at law; but even though he should have such a remedy, he has also a remedy here, and if he had commenced an action at law, the defendant might have restrained him, by injunction, from proceeding, and for this obvious reason, because a court of law could not compel him to give security, which a Court of Equity would hold that he was entitled to. And there are many cases of this nature, particularly where bonds have been lost, where the parties have come into Equity on that very ground; and the case of a negociable bill is still stronger; therefore I am of opinion that this suit is proper.

As to the charge of laches on the part of the plaintiff, I do not think that any has been shewn which can prevent the plaintiff from succeeding; and the defendant has surely but little cause to complain in this case that the plaintiff has not proceeded sooner against him, or in any other way. At the same time, however, no blame is imputable to the defendant for not paying the amount of the bill on the indemnity proposed, for he is clearly not bound to accept whatever security the plaintiff might offer.

Then the plaintiff having an equitable remedy

 in

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in this case, there is no limitation in point of the period within which he must file his bill, for he is not bound to any given time in a Court of Equity.

It appears that the plaintiff had tendered the defendant some security, which was rejected; on that, the question now is, whether the security the plaintiff offered was such as the defendant ought to have accepted: The Court cannot decide that question, and it must therefore be referred to the Deputy Remembrancer to say whether the security offered was sufficient; and if that should be found to have been insufficient, it must be referred to him to settle what security would sufficiently indemnify the defendant. The question of costs must be reserved till further directions.

It is certainly much to be lamented that so small a sum as that in dispute should have driven the parties into a Court of Equity.

Decree as prayed.

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Saturday, 7th June.

The KING *v.* SCOTT.

Where a *scire facias*, founded on an inquisition, misrecites the inquisition, and therefore fixes by such recital a day on which the debt had been found to be due, differing from the true day named as in the inquisition, the Court will give leave (on cause being shewn) to amend the writ, on payment of the costs, &c. even after the defendants have pleaded.

AN order to shew cause had been obtained by *Nolan*, in last Easter Term, for liberty to amend the *scire facias* in this case. It appeared that the writ had recited, that by an inquisition taken on the 2nd *July* (56 *Geo.* III.) *Bruce* and Co. were found indebted, &c. to the king; that by another inquisition of the same date, *John Cooke* was found indebted, &c. to *Bruce* and Co.; and that by another inquisition, taken on the 27th *July*, *Scott* (the defendant) was, A on the day of taking the said inquisition, indebted to *Cooke* in, &c.

Scott had pleaded a set-off. The proposed amendment was the insertion of the words—"*on the 2nd day of July*," and in that part of the writ which related to the finding of *Scott*'s debt [*marked above with a caret*]. It was moved, on payment of costs, the Crown undertaking to furnish the defendant with an office-copy of the *scire facias* and other proceedings, with liberty to plead *de novo* within eight days, or abide by the plea pleaded, and the two MS. cases transcribed in the note below were cited as precedents*.

Richardson

* M. T. 1710:

REGINA *v.* HOBLE.—*Scire facias* against *Ann Henkinson*, widow, amended by striking out the word '*vidua*,' she not being a widow.—Ordered as of course.

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The KING v. SCOTT.

Richardson now shewed cause, submitting, that the amendment, as moved, could not now be permitted after the defendant had pleaded, particularly where it went to the alteration of the day recited by the writ to have been found by the inquisition as the day on which the defendant was indebted to the debtor of the Crown: but

The Court having considered that the amendment could not operate to the prejudice of the defendant, and that it was in the delay of the Crown, made the

Rule absolute.

REGINA v. PETERS (12th *Anne.*)

Two extents had issued against the defendant, and two inquisitions were taken thereon; one in the 12th *Anne*, the other, 8th *Geo.* I. By the last inquisition, *Huggins* was found indebted to *Peters* in 1,500*l.*, and *Hart* was also found indebted to him in 83*l.* 14*s.* 3*d.* Two writs of *scire facias* were sued out against *Huggins* and *Hart*; one directed to the sheriff of *Middlesex*, the other to the sheriff of *Herts*. By mistake, the wrong inquisition was recited in each writ.—Mr. *Fenwick*, on the part of the Crown, obtained an order as of course, that the two writs should be quashed.

The

1817.

Friday. 13th June.

e ATTORNEY GENERAL v. Sir C. H. COOTE, Bt.

A statute imposing a duty on the property of persons residing in *Great Britain*, applies to persons residing there for any length of time, however short, although they may, at the same time, have a more permanent residence elsewhere.

An exemption of persons coming to reside "for "some temporary purpose only, "and not with "any view or "intent of "establishing "a residence "therein, "and who "shall not "have actually resided "in *Great* "*Britain* for "the period "of six successive calendar months,"

THIS was an information against the defendant for omitting to make a return of his property, as required by the Property Tax Act, (46 G. III, ch. 65*,) and the question was, on this application, to set aside the verdict found for the Crown, whether he was liable to the duties thereby imposed, under the following admitted circumstances:

* Sched. D. charges a duty of 1*s.* in the pound "on the annual profits or gains arising or accruing to any person or persons *residing* in *Great Britain*, from any kind of property whatever, whether situate in *Great Britain* or elsewhere."

By sect. 51, it is enacted, "That no person who shall, on or after the passing of this act, actually be in *Great Britain* for some temporary purpose only, and not with any view or intent of establishing his or her residence therein, and who shall not actually have resided in *Great Britain* for the period of six successive calendar months, shall be charged with the said duties mentioned to be charged in Sched. D. as a person residing in *Great Britain*, in respect of their profits or gains received from or out of any possessions in *Ireland*, or any other of His Majesty's dominions or any foreign possessions, or from securities in (&c.); but nevertheless, every such person shall, after every such six months residence therein, be chargeable for the same from the commencement of the year in which such person shall have been resident in *Great Britain*, or if not so resident, then for the period of his or her having so come into *Great Britain*."

"cessive calendar months," does not include a person taking a house in *London*, and furnishing and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment and resides for the remainder of the year there, leaving behind him some one merely to take care of the house.

Such a person is therefore within the act of the 46th *Geo.* III, ch. 65; but not within the exemption of the 51st section.

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That the defendant was in receipt, in *Great Britain*, of profits and gains arising from certain possessions in *Ireland* belonging to him, and was duly required by the assessor to make a return for 1814, as laid in the information, and incurred the penalties as claimed thereby, if the Court shall be of opinion that he was liable to make such return on the facts of this case.

That the defendant, who was born in *Ireland*, and resided while an infant with his mother Mrs. *Cook*, in *Great Britain*, where he was educated, came of age in *December* 1812, and continued to live with her until the 24th *June* 1813, when he bought and took possession of his present dwelling house in *Connaught Place*, which he furnished.—That he had continued in possession thereof so furnished up to the present time; and had been assessed for the said house, to all rates and taxes for the year 1814, and subsequent years, but not for any establishment under the assessed taxes.

That during the period of his residence in *Connaught Place*, from the time of his purchase up to the present time, he never lived there, or elsewhere in *Great Britain*, for the period of six successive calendar months, but usually went to *Ireland* to his place of residence there, after residing for 10 weeks in *Connaught Place*, from whence he did not return for the space of nine months, leaving, during such his absence, a woman servant to take care of the house, the remainder of his establish-

ment

ment going with him to *Ireland*, and returning with him from thence, when he returned to his residence in *Connaught Place*.

Dauncey and *Nolan* now shewed cause, relying wholly on the construction of the words of the statute with reference to its object, and they cited the case of the *King* v. *Sergent (a)*, to shew that a residence of the shortest duration, where the house had been taken for a year, had been held to be such a residence as would qualify a party for an office required to be filled by a resident.

Martin and *Maule* in support of the rule, rested the defendant's case on the facts, which they contended brought him within the exemption of the 51st sect; submitting, that the clause was not confined to a residence for a temporary purpose, but extended to all cases where the party resided here without intent of *establishing* a residence in *Great Britain*. They insisted, therefore, that to bring the defendant within the act, it was necessary to shew him domiciled in *England* and not in *Ireland*; whereas, there could be no doubt that, under the circumstances of this case, the defendant was domiciled in *Ireland*, and not in *Great Britain*; and they cited many authorities in support of that proposition, all of which are to be found in the case of *Somerville* v. *Somerville*; but the question of domicile, the Court afterwards said, did not apply in this case.

(a) 5 T. R. 466.

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They then submitted, that the various sections of the act explained the meaning in which the legislature had used the terms 'ordinary residence.' Sect. 50, for instance, was the converse of sect. 51. There the act charged persons ordinarily residing in *Great Britain*, notwithstanding any temporary absence abroad, clearly marking the intention to fix ordinary established residents with the duty, and that however short their actual residence might be. So the 41st Geo. III, ch. 62, exempts persons ordinarily resident in *Ireland* from the income tax, (39th Geo. III, ch. 13.) as with relation to income in *Ireland*; and also from the duties on servants, &c. imposed by the 38th Geo. III, ch. 41, and so had various other statutes, thus furnishing a legislative exposition of the meaning of the act, shewing that time was not considered an ingredient in an ordinary residence; all the purposes of a person coming to reside in *Great Britain* for so short a time as the defendant resided here, must be of a temporary nature. The *King* v. *Sargent* was a case where the question was, merely, whether the residence was of such a particular nature as was sufficient to qualify a person for the office of bailiff; but such a residence as *Sargent's* would not have brought him within this act.

DAUNCEY, about to reply, was stopped by

RICHARDS, *Chief Baron*.—The Court are of opinion that this verdict must stand.—In considering this question, I shall give my opinion as if I were

I were one of a jury deciding according to the evidence before the Court, on the question, whether the defendant came to reside in *London* for a temporary purpose or not; and that question we must also consider with a view to the object of the act. The fact of the defendant's *domicile* has nothing to do with the question, nor has the time of his residence any effect on the construction of the words of the act; for if the defendant came here for the purpose of establishing a residence, it were enough, although he should reside here only two weeks. The sole question is, whether he came here to reside with such a view as exempts him.—[His lordship detailed the facts of the case.]—I am of opinion that the defendant is clearly within the act. *Primâ facie*, he is liable. Then it is incumbent on him to shew that he is within the exemption. I think he has not done so; and had I been one of the jurymen I should have given the same verdict as has been found, and therefore I think it ought to stand. It is a strong fact, that the same servants who lived with him in town went to *Ireland*, and returned with him.

GRAHAM, *Baron*.—The verdict is found on very plain facts, and I think they shew that the defendant did not reside here for a temporary purpose. The question of *domicile* goes beyond the case. No doubt he was domiciled in *Ireland*, and so he might have been if he had resided here 20 years; but the question turns on the plain language of the act, and I think the intention of the legislature quite clear. If a man dies two days after forming his

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his establishment, is he not within the act? or may any man come here and stop till within a week of the six months, and then go to *Ireland*, and return for the purpose of avoiding the duty? Under the circumstances I think it is quite impossible to say that the residence of the defendant in *England* was occasional, or for a temporary purpose. At any period of the year he might have come to *Connaught Place*, where he would have found his house ready for him.

WOOD, *Baron*, of the same opinion. No doubt the defendant is liable under the act, unless he brings himself within the exemption. That, therefore, is the single question. If the defendant had come to reside in *London* for a temporary purpose, it might have been so stated; but it is clear that his residence here, while it continued, was for all manner of purposes. The difference in language between the 50th and 51st Sections, is very material to the consideration of this case. Had the words been "occasional residence," or had there been no other words, there might have been considerable doubt. It is no uncommon thing for a gentleman to have two permanent residences at the same time, in either of which he may establish his abode at any period, and for any length of time. This is just such a case: the defendant has two residences, and they are equally permanent. There is no pretence therefore for contending, that he comes within the exemption. If this were a temporary residence, he would probably change it sometimes, but in fact it is his own house.

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GARROW, *Baron.* Although the case has been argued with considerable ingenuity and ability, I have not been able to entertain a doubt on it for a moment. If it were a hard case, the Court could not take notice of that; but I think it is quite the other way. In the exigencies of the country this tax was imposed, and its object was to relieve the subject by throwing the great weight of it on those who were most capable of sustaining it. Is then a man, having a magnificent establishment, to be permitted to evade this tax on property, by continuing to reside on it just so long as may be sufficient to bring him within the case to which it is argued this exemption applies? And on the other hand, a person coming for a purpose really temporary, and is obliged from misfortune, perhaps, to remain over the period of six months, is to be compelled to pay! It would be defeating the very wholesome object of the act, to put such a construction on this clause. The preceding clause (Sec. 50,) is very explanatory of this section when the words are read with a regard to the object of the statute.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, Lord Chief Baron.

1817.
17th June.

PARSONS v. BELLAMY, CRIDLAND and Others.

A vicar claiming tithe of hay, may establish his right by sufficient proof of perception during living memory, where none can be shown to have been enjoyed by the rector, although his endowment actually negative his right to that tithe expressly, and state it to belong to the rector, on the presumption of a subsequent endowment, which the Court is bound to adopt.

[As to what evidence is sufficient to support such a claim, see the proofs as detailed in the case.]

Perception by means of a composition, which has always been understood by the parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind.

Perception of tithes by a vicar for any considerable number of years, where its inception cannot be shown, and it is not met by perception by the rector or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior, and of its having been founded on subsequent endowment. Nor will the Court grant the rector an issue in such a case.

A receipt for payment (by a person sued by a vicar for tithes) of the plaintiff's bill of costs, is evidence of the suit having resulted in favour of the vicar.—So is an entry to that effect in a former vicar's books.

THE plaintiff, as vicar of *Wembdon (Somerset)*, instituted the present suit against the defendants, the occupiers of *Sandford* farm, and the impropriate rector of the parish, for the tithes of hay, and grass made into hay, on that farm.

The answers of the *Cridlands* (the rector) admitted the plaintiff's right as vicar to the small tithes, but claimed the tithe of hay as impropriate rector, and stated that they had permitted the defendant *Bellamy* to retain the tithe for the hay arising from *Sandford* farm, which he held of them,

them, (the *Cridlands*) and *Bellamy* relied on their title.

Very many witnesses examined on the part of the plaintiff, proved that they had paid to him and his predecessors, as vicars, for a long series of years, (as far back as living memory), the tithe of hay mown on meadow lands within the parish by a composition, and that they had only rendered to the rector the title of corn,—that the tithe of hay had always been paid by composition and never in kind, and that the tithe of corn had always been rendered in kind to the rector, and that he had never received tithe of hay in the parish by composition or otherwise,—and that there had formerly existed, (as they had heard) disputes between the rectors and vicars as to the right of tithe hay, but that the vicars had ever uniformly continued to receive it, and the plaintiff produced very strong and remote evidence of long perception and reputation.

The plaintiff's endowment * was also put in,—it was dated in 1304, and was of, "all small tithes," but

* As the defence rested mainly on the terms of the endowment, it may be proper to give the exact words of the translation of the office-copy, extracted from the registry of the Bishop of *Bath* and *Wells*, intitled, "*Confirmatio Ordinationis Vicariæ de Wemedon*;" which are as follows:

'In this instrument the ordination of the vicarage of the parish church of Wembdon, by *W.* formerly Bishop of *Bath* and *Wells*, dated 6th *July* 1304, is recited. The portion of the vicar, who for the time being should ministrate in the church

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but it recited the rectorial tithes to be corn and hay of the whole parish.

church aforesaid, was thereby ordained to consist of one manse, with a garden, curtilage, and all other the appurtenances which the vicars of the said church before held and were used to dwell in, and three acres and an half of arable land, and four acres of meadow, to the vicarage of old time assigned; and also all oblations arising to the aforesaid church; and also the visitations of infirm persons; all elegacies, triennial payments, missals, with requests, anniversaries, and money given at confessions; and also with the whole wax arising to the church aforesaid, also the tithes of lambs and wool, and all other small tithes belonging to the church of *Wembdon*, by what name soever they might be known. It was also decreed that the said vicar and his successors should receive from the master and brethren of the hospital of St. John of Bridgwater, two quarters of wheat of good grain, two quarters of barley, two quarters of oats, and half a quartern of beans at the feast of St. *Martin*, in the winter, and the Ascension of our Lord, by equal portions to be divided; and that he should give the holy water to his clerks, who ought to carry it, and in the said church should ministrate and cause it to be decently served; and the master and brethren of the aforesaid hospital as rectors, the whole land and meadow of the demesne belonging to the said church, except three acres and a half of arable land, and four acres of meadow, the vicarage above assigned; and also the tithe of corn *and hay of the whole parish* of *Wembdon* entirely, should receive as before they were wont to do, to be deputed for the uses for which the appropriation was to them granted, into the portions of the vicarage of the church of *Wembdon* above assigned. *Richard de Bridport*, the then vicar, was instituted; and the same portions to the same (vicar) and to his successors, were assigned; and all ordinary charges the master and brethren of the hospital aforesaid, should support; and the extraordinary as to two parts; and the vicars for the time being, to sustain the third part; which said ordination above recited, was thereby confirmed.'

The

The Ecclesiastical Survey, and the Minister's Accounts, (20th and 35th *H.* VIII.) stated the rector to be entitled to tithe of corn, making no mention of hay. Certain compositions were produced, made between former vicars and occupiers, for tithes of whole farms, with express abatements for corn, and none for hay. The contract of sale of this farm, with the tithes of corn and grain, from Lord *Malmesbury* to the *Cridlands*, not mentioning hay, was also given in evidence.

The plaintiff produced various extracts from vicar's books from 1757 to 1790, where *memoranda* of payments received for compositions for the tithe of hay had been entered, and an account of certain proceedings in the Ecclesiastical Court, in a cause of *St. Albyn* (a former vicar) v. *Stacey*, to recover the tithes of clover, which was afterwards compromised, the occupier agreeing to pay the tithes to the vicar as before, and to pay the costs of the suit*. In

* That memorandum was proved to be in Mr. *St. Albyn's* hand writing, and was as follows:

'*N.B. Ambrose Stacey*, of *Bridgwater*, occupied seven acres; part of *Bowles's*, No. 19, not in the survey, and had clover in it, of which he made hay; and *Richard Tamlin* of *Wembdon* carried the hay for him; on his refusing to pay, I sued him in the court of *Wells*; he stood out about a year; his first plea was, that it was in the parish of *Bridgwater*, and had never paid tithes to the vicar of *Wembdon*; but finding that I could prove by Mrs. *Bowles*, the widow of the proprietor of the estate, that her husband had paid Mr. *Knight*, and that it appeared by Mr. *Knight's* book of accounts, page 35, that he had paid him several years, and he not being able to prove that

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In corroboration of which, a receipt given by the defendant *Stacey*, for the plaintiff's taxed costs, was offered in evidence.

[To these it was objected, that they were not admissible as proof of payment of the particular tithe now sought to be recovered; for that the receipt was not sufficiently explained by the other documents to shew for what precise sum, and on account of what particular tithe it was given, the libel itself evidently relating to other titheable matters, and the entry in the vicar's book (if that were evidence at all in such a case) speaking of the vicar's demand generally. *Non constat*, therefore, that it might not have been given for money received on account of other tithes than that now sought to be recovered.

But the *Lord Chief Baron* was of opinion, that the suit being in evidence, and that it had been put an end to, and a receipt given on its termination, the vicar's memorandum was admissible to shew on what account it had been given, because it had altogether the effect of making the vicar charge himself with the receipt of so much money. And, therefore, his lordship admitted the evidence.]

that he had ever paid the corporation of *Bridgwater*, he changed his plea, and swore he never occupied the seven acres in dispute. However, he soon after submitted, and paid my demands with costs, *June* 3d, 1766.

N. B. This estate pays great tithes every year to the impropriator of *Wembdon*.'

In

In the conveyances which were put in from Lord *Malmesbury* to the *Cridlands*, the tithe of corn and grain was mentioned, and no other.

Dauncey, and *Owen*, for the plaintiffs, relied entirely on the case having been fully made out by the evidence.

Martin, *Roupell*, and *Richards*, for the defendants, contended that such a case of strict and *positive* title in the vicar had not been made out as to enable the Court to decide against a rector without an issue; and they commented much on the various evidence, which, they insisted, strong as it certainly was, was still confined to living memory, and did not go to establish any express title to the tithe of *hay*, which had never been received by the vicars in kind; and it was clear that the vicarage had it not, by the endowment produced in evidence; and non-user or neglect of his rights, ought not to prejudice a rector standing not only on his common-law title, but also (with respect to the vicar) on an express reservation by the terms of his endowment.

Dauncey, about to reply, was stopped by

RICHARDS, *Chief Baron*.—I am of opinion that the vicar has made out such a case as entitles him to an immediate decree for an account of tithe hay. —It had occurred to me, that under the endowment produced the tithe of hay might have passed under the words "small tithes" for the endow-

 ment;

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ment; mentions "all other small tithes," but the tithe of hay is afterwards in fact absolutely negatived, and therefore under that endowment it is clearly out of the question. If, then, the plaintiff is entitled to hay, it must be under some subsequent endowment; and that the Court will presume in favour of a vicar, if the evidence adduced of his perception be so strong as to warrant it, and that is, therefore, the only question in the present case.

Primâ facie then, the rector in this instance, is entitled to the tithe of hay; and whether Lord *Malmesbury*, thought he had that tithe or not, or whether he intended to convey it or not, if he really was entitled to it, the defendants *Cridlands* now are, and therefore it is incumbent on the vicar to make out a clear case. It is material here to observe, that one of these parties must be entitled to this tithe; and it is important to see what was the nature of the contract between Lord *Malmesbury* and Mr. *Cridland*, for that furnishes evidence of perception from time to time; and if the vicar is found to be constantly in possession of the tithe, and that is not broken in upon by perception by the rector, I must infer that he has been so long in possession as to authorize a presumption of a subsequent endowment. Now the evidence of the vicar's perception has certainly not been broken in upon in this case, for it is admitted on all hands that the rector never had perception of the tithe of hay. In short, there is no sort of evidence offered on his behalf, except what arises from the tenor of the endowment; yet he

he certainly has shewn himself sufficiently attentive to his interests on other occasions, not to have neglected it in respect of the article now in dispute; and if he had thought that he had any right to the tithe of hay he would have asserted it. I do not admit that a lay rector is usually more negligent of his right to tithes than an ecclesiastical rector. I fear, on the contrary, that the clergyman is most frequently in the habit of neglecting his interest. The vicar's evidence of perception, then, we find to be so strong as not to be attacked even in argument, and that indeed is very candidly admitted; but then it is contended that the evidence does not go far enough back in point of time to establish such a claim against the common-law right of a rector. The evidence given goes as far back as living memory—[Here his lordship observed on various parts of the evidence furnished by the depositions of some of the witnesses, who were very old.]—Beginning, therefore, from so distant a period, and bringing it down to the time of the present vicar, we have a continued and constant stream of evidence to shew that the tithe of hay has always been compounded for with the vicar. Now evidence of a composition, is quite as strong in favour of a claim of the particular tithe, as if it had been paid in kind. As to some few exceptions, they only shew that the vicar was negligent. There can be no doubt, therefore, that the composition was paid for tithe-hay, for it could not have been so long mistaken: and that is the fair result of the evidence, for all the witnesses say that that was their view of the composition, and also that it was

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that of other persons, which is the kind of evidence that we call reputation; and this is continued for many years.

I had at first misunderstood the term "agistment" in the vicar's books; but I observe that there is a constant distinction preserved between plough-land and meadow-land. There are other things under the head agistment besides agistment and hay, and if there were any doubt about the heading term, the conduct of the parties makes it quite clear. The parol evidence shows enough to assist that difficulty, and we must adopt the meaning given to it by the parties themselves. After all, the vicar's books are only confirmatory evidence of the parol testimony, but they are strong. As to a vicar's making evidence for his successors, that is what I cannot listen to. This Court knows they do not do so, and the books of a vicar are as good evidence as the books of a steward, charging himself with money due to his employer.

Such, then, is the evidence on the part of the vicar; and as to the objection made, that the length of time is not sufficient, I am of opinion, that if it can be carried as far back as living memory, it is as much as is required. Human memory is certainly but as a day in itself, but it is enough to found a presumption on, that it has existed long anterior, unless that presumption is contradicted by evidence and disproved: 70, 50, or 40 years usage is sufficient to afford presumption of a subsequent endowment, otherwise, an endowment, or any other instrument, could

could never be presumed in any case by force of usage.

The suit in the ecclesiastical court I do not much rely on as evidence; nor do I think any thing of the marginal note to the draft of the conveyance. The fact, however, is, that there was a libel for tithe of hay and other tithes; it may be said that that was confined to a particular piece of land, but the defence set up was inconsistent with a consciousness of any title to the tithe in the defendants. First, it was that the lands were not in the parish; and next, that the defendants had had no titheable matters; and it appears from the evidence, which I admitted (and which I still think good) that the result of the suit was, that the defendant paid the demand, and with costs; now that was by no means like a compromise on the part of the vicar.

With such evidence personally applicable to the vicar, I think he has made out a strong case. Then it is supported by all the documents, except the endowment. The minister's accounts are confined to tithe of corn. That is certainly strong; and I cannot help now thinking that the transactions between Lord *Malmesbury* and *Cridland* are applicable here to shew that neither party ever thought that the tithe of hay passed; and it is materially important to shew that there had never been any perception by the rector. All that was sold was the rectory. At the bottom there is mentioned "tithes of corn and grain of the above estate;" if that is not evidence to shew that the rector had no title, it is enough to

 shew

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shew that at least he had no perception; thus, all the evidence proves perception in the vicar, and there is none the other way; and, I am bound, therefore, to give him a decree. Were I to send this case to a jury, and they should find a verdict against the vicar, I would send it down again and again till they came to the right conclusion, and found the other way. I consider myself bound by my oath, as a juryman is; and wherever there is sufficient evidence to enable me to decide one way or the other, if I did not do so, I should be guilty of an abandonment of my duty.

Account decreed, with Costs.

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GOUGH v. DAVIES and GIBBONS.

Tuesday, 17th June.

A person depositing money with bankers, and taking their accountable receipts, does not—by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons—discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent.

Nor are those circumstances sufficiently strong to justify such a case being left to a jury.—GARROW, B. *dubitante.*

THIS was an action of *assumpsit*, in which the defendant *Gibbons* having pleaded his bankruptcy, a *nolle prosequi* was entered as to him, and *Davies* pleaded the general issue. A verdict was found for the defendant at the *Stafford* Lent assizes, 1817, under the direction of Mr. *J. Parke*, who

left

left it to the jury, telling them that there were two questions of fact for their consideration *; 1st, Whether the plaintiff assented to the transfer of the credit from the old firm to the new? 2dly, Whether the defendant consented to take back the credit on himself?—In the former case he directed verdict for the defendant; in the latter, for the plaintiff. His lordship had expressed his own opinion to be, that under the circumstances of this case, the verdict ought to be for the defendant; holding that the plaintiff had impliedly assented to a transfer of the credit, and that an express assent was not necessary; and that the accountable receipts were to be considered merely as evidence of the payment of the money, and not as specific securities, having the same effect only as the entries of the same sums in the banker's books would have had. In the following *Easter* term, a rule having been obtained for setting it aside, the facts were stated, by the desire of the Court, in the following case:—

Thomas Gibbons, the elder, deceased, *John Davies*, and *Thomas Gibbons*, the younger, (the two defendants in this record,) carried on business as bankers, in partnership, at *Wolverhampton*, in *Staffordshire*, from the 1st *October* 1808 to the 10th *October* 1811, under the name of "The *Wolverhampton* Old Bank."

At the latter period, the partnership above mentioned was dissolved, and a new partnership

* See the case, *infra*, page 207.

 was

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was formed between the said *Thomas Gibbons* the elder, *Thomas Gibbons* jun. (the defendant,) and his brothers, *John* aud *Benjamin Gibbons*. Notice of the dissolution of the old, and the establishment of the new partnership, signed by all the parties, was published in the *London Gazette* of *November* 12th, 1811 * ; and the new partnership continued to carry on business, under the same name of "The *Wolverhampton* Old Bank," till *Thomas Gibbons* the elder, whose name stood first both on the old and new partnership, died, which was in *June* 1813; and the survivors continued to carry on the business, under the same name, till the month of *March* 1816, when the partners became bankrupts. The plaintiff, who has a place within two miles of *Wolverhampton*, which he comes to occasionally, but resides chiefly at another seat, about ten miles distant from *Wolverhampton*, from the month of *March* 1809, was in the habit of depositing money from time to time in the bank at *Wolverhampton*, for which he received unstamped receipts; and at the period of the dissolution of the old partnership, he had in his possession several of such their receipts for such money so deposited, amounting to the sum of

* The terms of the advertisement (which the Court required to know during the discussion) were as follows: "Notice is hereby given, That the partnership between—[*the parties, naming them individually*]—expires upon the 10th day of *October* inst.; and that the Bank will be continued by—[*the same parties, substituting the name of* Benjamin Gibbons *for* John Davies]—under the firm of," &c.

[*Signed by each of the Parties.*]

2,213*l.* 10*s.* 8*d.*; and which receipts he still holds, never having had any securities substituted. The form of most of those receipts was as follows:

"*Wolverhamton* Old Bank, 1st *March* 1809.

N° 263. RECEIVED of *John Gough*, Esq. two hundred and twenty pounds, to account for with interest.

£. 220. For *Thos. Gibbons, John Davies*, and *Thos. Gibbons, jun.*

R. Birch.

The interest allowed by the bank upon these deposits was four *per cent.* being the same rate of interest as that allowed by them on deposits to their customers in general; and some few of the receipts expressed the rate of interest. At the dissolution of the old partnership, the balance of the plaintiff's account was brought forward into the concerns of the new firm. This was done without consulting him; but he knew of the dissolution, and continued to deposit money in the bank after the new partnership commenced, for which he had the accountable receipts of the new firm sent to him for such deposits from time to time; and each time a balance was struck, the interest upon the whole sum, as well that part of it which was deposited before, as that part which was deposited after the new partnership was formed, was calculated as upon one aggregate sum without distinction; and when the new firm became bankrupts, the plaintiff held their accountable receipts for 1,941*l.* 13*s.* 6*d.*, exclusive of the receipts above mentioned for the old balance of 2,213*l.* 10*s.* 8*d.*, as appeared by the plaintiff's account, as it stood

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stood at the bank at the time of the dissolution; and that balance was due from the firm of *Gibbons, Davies,* and *Gibbons,* in which the defendant was a partner at the time of the dissolution. The account is then brought forward by the late firm, leaving a balance of 5,018*l.* 14*s.* 9*d.* in favour of the plaintiff.

The plaintiff, at various times after the dissolution, applied for and received several sums at several times, from the new partnership, as interest, which was calculated upon the whole account, without distinction, including the balance due at the dissolution of the old partnership; and he acknowledged the receipts of sums due for interest, by letters addressed to Messrs. *Gibbons* and Co. bankers, *Wolverhampton,* without objecting to the manner in which the accounts were kept or the interest calculated; and in 1814, an account was rendered him, by his desire, which was headed,— "Received of *John Gough,* esq. by *Gibbons* and *Co.*" Then follow the receipts, amounting to 3,128*l.* 10*s.* 8*d.*

There was also received, *December* 18th, 450*l.* which was requested not to be put in the general account, with the following remark "because I expected I should want it in a few days." Those words were in the plaintiff's hand-writing upon the paper containing the said account. On the 4th *May* 1816, the solicitor for the plaintiff attended a meeting under the commission of bankruptcy, and there met *John Davies,* the defendant, and stated to

to him that the plaintiff had a demand against him and company; and shewed him an account drawn out by himself, (the solicitor) of "Accountable Receipts of the *Wolverhampton* Old Bank, of *Thomas Gibbons*, *John Davies* and *Thomas Gibbons*, jun. held by Mr. *Gough*," amounting to 2,213*l.* 10*s.* 8*d.* *John Davies* said, he knew of it before; that he had made various applications to the bankrupts to be exonerated from all claim or risk on account of that demand; that he considered he had been used very ill by them; that he had come into the country previous to the last *Christmas*, for the purpose of getting exonerated from the claims which might be made by Mr. *Gough*; that he then suspected the affairs of the bank were in a precarious state, and had threatened them, unless he was exonerated, that he would make a personal application to Mr. *Gough* to call in his money; in consequence of which, he had obtained a bond of indemnity from *Benjamin Gibbons*, sen. to secure him against that demand, and some outstanding demands which existed against the partnerships of which he had been a member at the time of the dissolution; that it was his disposition to pay all his debts honourably, and he held himself bound to pay such demand as the plaintiff might have against him, and all other demands outstanding against him, as far as his property would go. The solicitor for the plaintiff said, that *John Davies* the defendant, had been very ill used, and promised to use his influence with the plaintiff to obtain him every facility to recover his money from the other parties, having understood *John Davies* to have stated at that time,

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time, that *Thomas Gibbons*, sen. (whose name stood first in the old partnership,) had left a large property more than sufficient to pay all the debts. On the 10th *June* in the same year, this action being then commenced, the solicitor for the plaintiff again met *John Davies*, attended by his solicitor, and also by the solicitor and a friend on behalf of *Benjamin Gibbons*, the surety, when the account above stated, and shewn to *John Davies* on the 4th *May*, was again exhibited, and its correctness as to sums and dates, admitted by Mr. *Davies* and all parties, and the following proposition was put into writing by the solicitor for Mr. *Gibbons*, and left with the plaintiff's solicitor, to be submitted to the plaintiff, and was ultimately assented to by him; but after a long correspondence and negociation thereon, nothing was done in consequence of such proposal.

"Mr. *Benjamin Gibbons*, sen. is possessed of three shares in the *Staffordshire* and *Worcestershire* Canal, of the value of 2,000*l.* which Mr. *Pearson*, on behalf of Mr. *Gibbons*, proposes shall be assigned to or deposited with Mr. *Gough*, together with his bond, as a collateral security for the sum of 2,033*l.* 10*s.* 8*d.* and interest, (for which he stands a guarantee to *Captain Davies*, under a bond of indemnity dated 13th *January* last,) to be payable at the end of twelve months from Midsummer next. If this proposition is accepted, Mr. *Gough* not to be precluded from proceeding against any other parties for payment of his money in the mean while.—11th *June* 1816."

The

The learned Judge before whom the cause was tried, left it to the jury to consider whether the plaintiff had not assented to making the new firm his debtors, observing, that with respect to the communication since the bankruptcy with the defendant, that he did not know there had been any subsequent dealings between the parties, and therefore it was for them to say whether if the plaintiff had assented to the transfer of the debt, the defendant had agreed to take it upon himself again.

The jury found a verdict for the defendants.

Dauncey and *Petit*, in support of the verdict, now showed cause.—They submitted, that a debt or credit might be transferred at law, and it having been said that it would require strong evidence to establish such a transfer, admits that it may be matter of evidence. It was established in this case by the verdict of the jury, with the approbation of the Judge. Then having brought together the material facts—they submitted, that as at the trial much reliance was placed by the plaintiff on the effect of the facts, and of the several conversations proved, as tending to elucidate them, all which were before the jury, their decision was complete and conclusive.

In the case of *Browning* v. *Stallard (a)*, where one had sold and delivered goods to another, who transferred them to a third person, (the defendant,) which was mentioned to the seller when he

(a) 5 Taunt. 450.

called

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called for his money in the presence of the defendant; that was held to be a transfer of the goods, and gave the seller a right to recover against such third person.

In the case of *Surtees* v. *Hubbard (b)*, *Lord Ellenborough* held expressly, that though choses in action are generally not assignable, yet where a party entitled to money assigns over his interest to another, although the debtor may refuse his assent, any thing like an assent on the part of the holder of the money would suffice to maintain an action against him for money had and received, because *such an action is an equitable one.* In *Williams* v. *Everitt (c)*, there was an express dissent on the part of the holders of the money, and no privity of contract between the plaintiff and defendants, but the principle is admitted there, that money had and received might be transferred with consent of the holder. The same point is to be found so ruled in the case of *Israel* v. *Douglas (d)*, and in *Moulsdale* v. *Birchall (e)*, and that even where the amount of the debt transferred was uncertain. The case of *De Burnales* v. *Fuller (f)*, also supports the same position.

In the present case, the bank assented to the transfer of the credit which had been originally given to *Davies*; and the plaintiff, by all his

(b) 4 Esp. 203. (c) 14 East, 582.
(d) 1 H. Bl. 239. Sed vid. *Taylor* v. *Higgins*, 3 East, 169.
(e) 2 H. Bl. 820. (f) 14 East, 590 (*notâ*).

his

subsequent dealings with them, manifested his entire confidence in the bank, and tacitly agreed to the transfer of the debt due from the old firm to him to the credit of the new firm.

This is an equitable action, and the courts of equity have always kept in view the object of meeting the justice of every such case as this, in their determinations on similar questions. In *ex parte Peele*, (*f*) the present Lord Chancellor said, speaking of the case of *Shirreff* v. *Wilks* (*g*), which had been cited in argument,—" Very slight evidence " possibly might have been sufficient to shew, that " the partner knew the stock had been sold, " and the benefit taken into the stock in which he " was partner, and therefore it was conscientious " that he should become liable for that."

They then took several points of distinction between the present case and that of *Daniel* v. *Cross* (*h*); as that in that case the plaintiffs were creditors of the old partnership, by notes for money paid into the bank: whereas, here, nothing had been given but mere receipts—there, the partnership had been only recently dissolved,—here, it was four years and a half, and no application had been made—there, also, there had been no independent dealings between the creditor and the new firm, as a new firm, but all that passed between them was referrible to an agency on the part of the new firm for the former partner. They also distinguished the present case

(*f*) 6 Ves. 602. (*g*) 1 East, 48. (*h*) 3 Ves. 257.

from

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from that of *Devaynes* v. *Noble* (*i*) as not being one on a question of following the assets of a deceased partner; and as that was a case where the interval of the change of firm and of dealing with the two firms was only eight or nine months, they submitted, therefore, that this case was rightly left to the jury, and that the Court would not now disturb the verdict.

Jervis, in support of the rule, contended, that the direction of the learned Judge was incorrect, and that the jury had drawn a wrong conclusion. He submitted, that if *Gough* had been desirous of proving this debt under the commission against the new firm, he would not have been permitted to do so on the ground of his legal right, as against the present defendant—that nothing had been done by the plaintiff to release *Davies*, who was clearly originally liable—that the plaintiff had never trusted the new firm exclusively, or shewn himself to have done so by any one act. He relied altogether on the facts of the case, and the authority of *Cross* v. *Daniel*, and the cases there cited.

Puller, on the same side, was stopped by

GRAHAM, *Baron*.—The question left to the jury was, Whether, under the circumstances, they would presume that the plaintiff had adopted the new firm as his debtors, to the release and discharge of the old? According to the view which I have of

(*i*) 1 Merivale, Ch. Ca. 530.

this

this case, it does not appear to me, with deference to the learned judge, that the case furnished sufficient evidence to induce the jury to come to this conclusion.

I lay aside the conversation between the defendant and the plaintiff's attorney; not that I say it was not evidence, but I do not consider it of any weight; and out of respect to the learned Judge, I will suppose there is some doubt about it, though I cannot impute to the gentleman who had that conversation, an intention to entrap the defendant.

The evidence is, that there was a firm composed of *three* persons carrying on business as bankers, one of whom still remains a partner in the new firm. This gentleman, the plaintiff, deposited money with that firm, from 1809 till 1811, when it was dissolved. A new partnership was then formed, with whom the plaintiff continued, trusting to the credit of the firm, to deposit money until their bankruptcy, taking accountable receipts; and on that part of the case the books, if produced, would have furnished decisive evidence.

The amount deposited with the old firm was, 2,213*l.* 10*s.* 8*d.* In *October* 1811 the new firm was constituted; and it is important to consider of whom it consisted. One of the old partners goes out, and two of the old partners, Mr. *T. Gibbons*, senior, and Mr. *T. Gibbons*, junior, continue. Two new partners are admitted, and Mr. *Davies* is excluded. We have no evidence of what was done by the part-

 ners

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ners *inter se*. *T. Gibbon* the elder died in 1813; and the firm goes on without any alteration. No agreement is shown relating to what took place—no settlement of accounts—nothing is drawn from the plaintiff's mouth, to show that he released the old firm—nothing has been adduced to make him appear to have trusted the new firm, but the mere fact, that he goes on paying money to the new firm, and receiving interest.

There is therefore no evidence to show that Mr. *Gough* adopted the new firm: what more has he done, than to say I am perfectly willing to take your security for the new debt, but I don't release the old firm. I keep their accountable receipts. Then it is said, that in the new books these gentlemen did, with the knowledge of the defendant, debit themselves with the old debt; but it is not proved that the plaintiff knew it. Their books would have given important evidence; and the reserve of the books shows they would not have furnished decisive evidence in the defendants favour. Nothing is shown but the account marked C. stating the specific sums paid in. They go on in the same way from the first to the last. It appears to me that this account made an impression upon an extremely intelligent mind, that these sums were carried to the debit of the new firm, but I think otherwise. Supposing the plaintiff to have known the contents of the books, there was nothing to lead him into an impression, that by receiving interest of the new firm, he was discharging the old. He says (it is true), "I call upon you for payment of interest upon the

 whole

whole debt, but one of the old firm remains a partner in the new, so that one of you, at least, is responsible to me for interest on the whole." Then he does not give up the accountable receipts; therefore it strikes me, that the mere circumstance of his receiving interest of the surviving partner cannot release the old firm. Suppose he had brought his action against the new firm, how could he have maintained it? The mere production of the paper, and the draft for payment of interest, would, I think, have been insufficient. If the new partnership had given notice to him to produce the old receipts, he would have been nonsuited, and this general tally of sums received would have been no answer. It seems to me to be going too far to say, that there is any evidence to show that the old firm was released. The conversation with the solicitor is not immaterial; and the defendant did actually receive an indemnity for this demand. The case, I think, was too weak to be left to a jury; it should have been said, that there was not sufficient evidence to exonerate the defendant from his responsibility for the money actually advanced to the bank before he ceased to be a partner.

WOOD, *Baron.*—I am of the same opinion. It does not appear to me that there was evidence to discharge *Davies*, as one of the partners of the old firm. The plaintiff deposits money with the bank, or in other words, lends it to them at interest. The old partnership is dissolved; and new partners are taken in: he trusts the new partners as he did the old; but that is not in itself any discharge. What

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then is there proved beyond that, to discharge *Davies?*

There is not any evidence that the plaintiff agreed to release the old and receive the new firm as his debtors. The only evidence is, that the new firm paid interest upon both debts; one of the new having been a partner in the old firm. What does this prove? The plaintiff might not have known that a new partnership was formed; but even if he knew that the new firm took upon themselves the debts of the old, it would not have affected him, as discharging them; nor would any thing passing merely *inter se* have done so. There is nothing, that I can see, except the mere payment of interest, which looks any thing like a discharge, and I cannot think that that can discharge the old firm, more especially as one of the partners was the same. At first, I thought there had been a balance struck, and carried to the debit of the new partnership account; and that the plaintiff had known of that, and had assented to it: if he had done that, it would have been a very different thing; but that is not the case, no balance had been struck. It does not appear that they have in their own books done so.

If it had appeared that the plaintiff had received from the new firm as much money as would have paid the whole of the old account, it might have discharged the defendant; but no agreement between themselves and the new partners would discharge the old partners from *Gough's* demand. It appears to me, therefore, that the direction was wrong,

wrong, and that the case of *Cross* and *Daniel* is in point.

GARROW, *Baron.*—I cannot agree that there was no evidence to be left to a jury; I think there was important evidence to be left to a jury, and that the judge was so far right. In deference to the rest of the Court, however, I abstain from saying more. I would only observe, that the withholding the books cannot be imputed more to one of the parties than to the other of them; because the plaintiff, by giving a subpœna *duces tecum* to the banker's clerk, might have compelled their production.

It is not necessary for me to go into the case at any length: the majority of the Court being against me, there must be a new trial. I shall not attempt to show, and do not mean to intimate, that they are wrong, but merely to say that I certainly entertain much doubt.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

[*Coram* RICHARDS, *Lord Chief Baron.*]

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Wednesday, 18th June.

ARMSTRONG *v.* HEWITT and others.

It is not sufficient that a vicar,—who rests his case on presumption of an endowment from evidence of perception,—prove that he has received the tithes claimed from the rest of the parish generally, and even from part of the district in which the defendants lands are situate, unless he carry it to the parts for which the exemption is claimed by the defence. And the vicar not doing so, proof on the part of the defendants, that no tithe has ever been paid for their lands, will entitle them to an issue.

Nor will the Ecclesiastical Survey, (stating the vicar to be entitled to tithe-hay in the parish generally,) supply the absence of proof of perception from the particular lands.

The thre elegitimate repositories of terriers and vicars books, to make them evidence, are, the church-chest—the registry of the bishop—and the registry of the arch-deacon.

THE principal point in this tithe cause, which was instituted for an account of tithe of hay, was, how far perception to a certain extent, in certain parts of a parish, was evidence of a vicar's general title to the tithe in question, in other parts wherein he could not prove perception.

The plaintiff was lessee of the vicar of *Stanwix*, *(Cumberland,)* and the defendants were occupiers of portions of land in certain districts called *Cringle Dyke* and *Burnt Hill*, which were of considerable extent; and this bill was filed for the tithe of hay over the whole, claimed under an alleged right founded on prescription as presumptive of an ancient endowment. The defence set up by *Hewitt* was a title to the tithe as derived to him by mesne conveyances from the persons entitled to the impropriate rectory.

The answer stated, (denying the vicar's right, and deducing the title set up by the defendants

from

from the former owners of the tithes of corn, or prescriptive payments in lieu of the tithes issuing out of the lands within *Cringle Dyke,)*—that being neither these defendants nor any former owners or occupiers of these lands, had ever made any payment to the present or any former vicar of this parish, in respect of any tithe of grass or hay produced on such lands; and that no such tithe had ever been received in kind by any vicar, for the lands occupied by the defendants, or any other lands within the district; and suggested that if any payments had ever accrued due in respect of such lands, they were due, not to the vicar, but to the persons entitled to the tithe of corn within the district of *Cringle Dyke.* And they submitted, that if any former vicar had ever, at any time, been entitled to the tithe of hay of the lands in question, it must now be presumed that they had been since commuted for some valuable consideration.

It appeared that the parish was subdivided into nine districts, of which *Cringle Dyke* was one, and *Cargo* (wherein some of the lands were situate, according to some of the witnesses,) another; and to those this case more particularly applied.

The plaintiff put in, as the only documentary evidence of his general right to tithe of hay in the parish, the ecclesiastical survey of the 26th *Henry* VIII. which stated the vicar to be entitled to tithes of hay within the parish,—vicars books, containing entries of money received for tithe of hay,—and various terriers, noticing that tithe-hay

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was payable in kind to the vicar, except as to certain persons not connected with the present suit.

[Those vicars books were produced from the church-chest. It was objected by *Martin*, that they were, therefore, not admissible in evidence against the occupiers in support of the vicar's claim; for that as they had not been found in either of the only proper repositories*—the bishop's register office, or the archdeacon's registry—but were brought from a custody peculiarly under the control of the vicar, he was not entitled to use them in his favour; and he cited *Atkins* v. *Hatton (a)* and *Miller* v. *Foster*, in the note to that case.

On the other hand it was insisted, that the parish church-chest was an authenticated and legal repository, and one which invested the document with as full authenticity as either of those which had been named; and that such a custody rendered terriers admissible in evidence, on which ever side of a tithe-question they might be offered; because it is a repository connected with their contents, accounting for the custody. *Potts* v. *Durant (b)*. *Bullen* v. *Mitchel (c)*.

RICHARDS, *Chief Baron*.—If this book had been produced from the same custody by a plaintiff, in a

* It was stated by Mr. Caley, that there were three legitimate repositories; namely, the bishop's registry, the registry of the archdeacon of the diocese, and the church-chest; and to that statement the Lord Chief Baron assented.

(a) 2 Anstr. 386. (b) 4 Gw. 1406. H. 1450—4.
(c) *Ante*, Vol. II. p. 211.

suit

suit to establish a modus, it would clearly be evidence for him: why then is it not admissible against him? The books contain historical facts connected with the parish; and what place is so proper for the custody of such a piece of evidence as the chest of the parish church. The propriety of its custody is founded on the same principles as those which regulate such questions with respect to terriers.

The Books were therefore admitted.]

The depositions for the plaintiff tended to show that the vicar had received the tithes of hay in the parish generally, and in the district of *Cargo*.

On the other hand it was proved, that neither the vicar's, nor any of their lessees, had ever received any such tithes for the lands occupied by either of the defendants. The persons who had farmed the tithes of hay of the parish under several former vicars also proved that they had never taken or demanded tithes of hay of the lands in question, because they did not consider themselves entitled to them; for that the last vicar had informed his lessees that the vicar was not entitled to the tithes of hay for the lands of *Cringle Dyke* and *Burnt Hill*; and one witness stated that compositions had been paid for these lands to the impropriators for tithes both of corn and hay.

Martin and *Barber* contended, that a sufficient *primâ facie* case had been proved by the plaintiff to cast on the defendants the *onus* of establishing a defence

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a defence by proving either a title to the tithes of hay, or an exemption, particularly as there was no one mentioned to whom the tithe of hay has been paid.

Dauncey and *Phillimore*, for the defendants, insisted that a vicar was bound to make out a clear title before he could call on the defendant to answer his case; that in the present instance the vicar had given no proof of perception of the tithes of hay from *Cringle Dyke* or *Burnt Hill* farms, for that no part of the evidence went to affect those lands; his case, therefore, resting on perception, failed as to all such parts as were not shown to have ever paid any tithes. There is also evidence of disclaimer; for it appears that the vicars have, on many occasions, let their tithes with an express declaration that they had no right to tithe-hay. And they submitted, therefore, that the plaintiff had not made out such a satisfactory case as to call on the occupiers for any defence.

RICHARDS, *Chief Baron*, [having stated the object of the bill.]—In this case the vicar is undoubtedly bound to show his title, for the common law gives him no right, and the plaintiffs, who are his lessees, stand in exactly the same situation as the vicar himself.

The plaintiff is in this predicament: having no existing endowment to produce, we must collect entirely from the evidence of usage, whether there ever was an endowment giving him the tithe of hay. The

The first evidence is the Ecclesiastical Survey, 26 Hen. 8, from which it appears, that the vicar had *decimas fœni*; and wherever that survey is considered as evidence, it is no doubt in the nature of an endowment. But the ecclesiastical survey, or any other ancient document, is not, in point of evidence, equivalent to an endowment or to usage. Then there are produced five vicars books, from which, at one time, I thought that there was a general title shown to be in the vicar, to entitle him to the tithe of hay throughout the parish, and that they would be sufficient to authorize me in deciding this case in favour of the plaintiffs; but we must look at the evidence on the other side, and it happens, that in a court of equity every witness whose depositions appear on paper, is unfortunately equally entitled to credit, and so far I have not the means which a jury have of weighing the testimony of one witness against that of another. Now, the nature of the present question is not whether there exists any title in these defendants, but whether the plaintiffs are entitled. It is enough for the defendants to rest their case on the denial of the plaintiff's title. From the evidence, I say, the vicar has shown himself to be entitled generally to tithe-hay throughout the parish, yet from the same evidence I must say, that the plaintiff has not made out a title to hay in every part of the parish. The vicar's books are strong evidence, and they support the ecclesiastical survey; but they do not show that the tithes are due to the vicar for these farms, for they only show him to be entitled generally, and not to every acre of the parish. So far, the present case differs very materially from

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from that of yesterday (d); for there the evidence was all one way. Then let us see what is the case that the defendant opposes to that of the vicar. The plaintiff admits that there is no evidence of any vicar having ever, in fact, received tithe of hay of the lands in the occupation of the defendants. In the case of yesterday, the plaintiff had constantly received the tithe. Then to meet the inference which would otherwise necessarily arise from this non-perception, the plaintiff has endeavoured to prove that no hay had been produced on these lands worth collecting, but he has failed in proving that; for within the last forty years it is shown that the lands produced good crops of hay, the tithe of which would have been well worth collecting, and that is proved by a person whose interest it was to collect the tithes. He adds, indeed, what seems to me, who am bound to give credit to his testimony, to be certainly a little extraordinary, that the vicar had declared that they were not entitled to the tithe of hay on these premises. Other witnesses state that there was but little hay, but none of the witnesses say that there was none. The evidence for the defendant again shows that tithe was never paid for these lands to any one; not meaning that they were exempt, but that they paid no tithes to the vicar; that must be taken to be the effect of it. Then in other parts of the parish it is proved that tithe of hay was paid to the vicar, and that evidence is certainly strong; but such evidence, although it gives great assistance to

(d) *Parsons* v. *Bellamy*, ante, p. 190.

the

the ecclesiastical survey generally, does not carry the perception of the tithe through the whole parish, as it has been truly said it was incumbent on the plaintiff by his evidence to do.

[His lordship then went into the contradictory evidence given as to there not having been a sufficient crop of hay produced on these lands to make the collection of it worth while; and adverted to the positive evidence of the declarations of former vicars, that no tithe-hay was due.]

Then what am I to say to this case, where there is this sort of adverse testimony. I cannot decide this cause (as I did that of yesterday) as a jury may, for I am equally bound to believe the evidence on both sides, where there is conflicting testimony. The vicar's lessee, who was likely to be acquainted with the extent of the vicar's right, does not demand the tithes of hay arising from these lands, because the vicar told him he was not entitled to them; thus the actual non-perception is founded on an intentional deliberate disclaimer; and then what becomes of the suggestion, that the tithe was not worth collecting. Add to all this, that some of the witnesses say, the tithe was not paid to the vicar, because it belonged to the *Aglionby* family. On the whole, therefore, although there is no doubt that the vicar is entitled to tithe-hay in very many parts of the parish, it does not necessarily follow that he is entitled to it from these particular lands, from which he has not proved any perception. The question then is, whether on such evidence I can decide this

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this cause now. There is evidence that no tithe-hay has ever been paid to the vicar for these lands; that the vicars have disclaimed their right to tithe-hay of these lands; and that in fact these lands were accountable for that tithe to another person. Under these circumstances I am bound to do (what I never will do where I can avoid it,) put the parties to the expense of sending this question to be tried by a jury.

Issue decreed.

1817.

Friday, 20th June.

The ATTORNEY-GENERAL *v.* GREEN.

A maker of vinegar for sale, whether as vinegar, or as blacking, or as any other article not being vinegar properly so called, or pure and applicable to the common uses of vinegar, is liable to the duty of excise, and the other provisions of the several statutes relating to the makers and preparers of *vinegar* for sale.

It is not necessary to *state* in the information that the liquid was preparing *for sale*: that may be *proved*.

THIS was an information *in rem*, for the condemnation of 8,519 gallons of vinegar, and liquors preparing for vinegar, seized by the Excise for being fraudulently deposited in an unentered place, with intent to evade the duty under the 43d Geo. III. ch. 69 * Sched. *A*, and which had been claimed by the defendant, who was a blacking-manufacturer.

The cause was tried before the *Lord Chief Baron*, at the sittings in *Middlesex*, after Easter term; when the jury found a verdict for the Crown upon the 2d count, charging the article seized to be a liquor preparing for vinegar.

* "For every barrel of vinegar, vinegar-beer, or liquors preparing for vinegar, which shall be brewed or made in *Great Britain* for sale, to be paid by the maker thereof, 10*s*."

Jervis,

Jervis, on a former day in this term, obtained a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground that it ought to have been stated in the count to have been vinegar preparing *for sale*, according to the 42d Geo. III. ch. 93, sec. 17.

[WOOD, *Baron*.—It would be sufficient to prove that it was preparing for vinegar for sale.]

Another ground was, that the liquid seized was preparing for blacking, and not for vinegar.

It appeared by the Lord Chief Baron's report to have been in evidence, that the defendant, in his trade of blacking-maker, made and used a certain liquid (frequently sugar-water, as it was called, and coopers-wash), which was in point of fact, vinegar, or at least, a preparation for vinegar, mixed, however, with oil, and lamp or ivory-black, and other ingredients calculated to make blacking; that before it could be used for that purpose it must become vinegar, and was made so by being exposed to the sun and air—that vinegar might be so made of those and many different materials, and that the liquid, which was the subject of the present information, was good vinegar, when it had deposited the other materials which had been mixed with it, by standing for some time.

Dauncey, *Clarke*, and *Walton*, now showed cause. They submitted that the sole question, which was one of law, was, whether it were necessary to bring the defendant within the purview of the

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the several acts of parliament on the subject of the duties of excise on vinegar, to show that the liquid was preparing for *vinegar*, to be sold *as vinegar*; and they contended that it was not; for if it were vinegar, and sold, it would be sufficient, whether it were sold as vinegar, or as blacking, or any thing else, provided the liquid was in point of fact, *vinegar*.

They then adverted to the several statutes on the subject, beginning with the 8th of *Anne*, ch. 9, sec. 4 & 5 *, for removing doubts as to the duty being chargeable on makers of pickles, and expressly exempting the makers of white lead, and white lead only, as showing what was intended by the legislature as to who were liable; and by de-

* "*And whereas it may be doubted whether such persons as make vinegar, and use the same in the preparing or making of pickles for sale, are vinegar-makers within the meaning of this and the other acts relating to the duties upon vinegar;* it is hereby declared, That from and after the commencement of this act, the vinegar so made and used is and shall be liable to the duties by this act, and the former acts, whereby the duties on vinegar are imposed; and the said persons shall, to all intents and purposes, be deemed and taken to be the makers of vinegar for sale, within the meaning of the same acts.

"Provided always, That nothing in this or any other act, shall extend, or be construed to extend, to charge with this or any other duty, such vinegar as shall be made by the manufacturers of white lead only, and used and consumed by themselves, in the making and preparing the same, and to no other use whatsoever; nevertheless, such makers of vinegar, so used in the preparing of white lead (in case they shall sell or deliver out any vinegar whatsoever by them made, to any person or persons, or employ the same for any other use,) shall from henceforth be chargeable with all duties payable to her Majesty by vinegar-makers, for all vinegar by them made or to be made."

claring

claring that white-lead makers shall be exempt; it not only shows that vinegar in any shape is liable, but that no other article made with it is favoured but white lead alone.

Jervis, *Lawes*, and *Nolan*, in support of the rule, treated the question as one compounded of law and fact; and contended that the evidence did not bring the defendants within the act; the words expressly imposing a duty on liquor preparing for vinegar for sale; whereas the acid in question was not preparing for vinegar, but for blacking;—not for the common purposes to which vinegar is applied, but for making a commodity which could not be considered or used as vinegar for culinary and other domestic purposes. Such was the distinction taken by the statute of *Anne* (an. reg. 8, ch. 4,). There the vinegar, used as such in pickles, was declared to be liable, but that the vinegar used not as vinegar, but for the purpose of making white lead, was not. The acid used by the defendant would never have been sent into public as vinegar, or sold as such. The statute of 10 & 11 *Will.* 3, ch. 21, sec. 11, on the same subject, speaks of "liquor proper for making vinegar found in the possession of a vinegar-maker." The duty, therefore, is only to be taken from the vinegar-maker, and that while it is in a state of preparation for vinegar. All the acts on the subject apply to common vinegar-makers, who prepare that commodity for sale; and they insisted, that this defendant was not to be considered as a vinegar-maker, or as having a preparation for vinegar in his possession, within the letter or policy of any of those

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acts of parliament; and that so to construe these statutes would be injurious to the commerce of the country.

Dauncey having replied;

RICHARDS, *Chief Baron.*—I am glad that this question, which is certainly an important one, has been brought under discussion. It appeared to me at the trial, that the Crown was entitled to a verdict in case the jury should be of opinion that this liquid was, in point of fact, vinegar, or a preparation for vinegar for sale, of whatever materials it may have been made; for it is immaterial whether it were made of malt, or sugar and water, coopers-wash, or of any other article; for in either case it would be equally within this act of parliament.

Vinegar, as the witnesses said, is a necessary ingredient in making blacking; and being so, this liquor was no doubt, while undergoing fermentation, a preparation for vinegar, and was actually so preparing when found. The single question was, whetherany such liquid, whether preparing for vinegar, or having become vinegar, was chargeable for the duties, unless intended to be sold as vinegar; and I think that if sold as blacking it is within the act.

As to the liquid being vinegar, and having been made for sale, that was clearly proved; and according to the evidence of the officer, if it had been found on the premises of a vinegar-maker, it must have paid the duty, and so it would if it had been sold to *Green.*

Then

Then it becomes unnecessary to take into consideration the object of its ultimate application; for if it be liable to duty at all, it is liable during the time that it is in preparation.

The present question is, whether the defendant making this for sale not as vinegar, but as blacking, is chargeable with the duty. No doubt, for making vinegar, if not for sale, but for domestic purposes, he would not be liable. The 4th section of the 8th of *Anne* was introduced to remove doubts which had been entertained as to whether vinegar used in making pickles was liable; but the next clause, declaring that the act shall not be construed to extend to makers of white lead *only*, is very material; for the word 'only' is an express exclusion of all other exemptions—[His lordship read the 4th and 5th sections]—After comparing these two clauses, it seems impossible not to say that a person in the situation of this defendant is liable to the duty. He does not indeed, it is true, call himself a maker of vinegar, but a maker of blacking; but the question is, whether he is not a vinegar-maker in fact. It was urged, that he did not sell it as vinegar, but as blacking. But he makes the vinegar, and he sells it, no matter under what denomination. In fact, this very person once entered his premises, and was charged with and paid the duty. In point of law, I am of opinion that the direction was right; for it was a question altogether for the jury; and as to the evidence there was not the least doubt.

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GRAHAM, *Baron.*—In order to sustain this verdict, it is necessary to show that this liquid was a preparation for vinegar for sale at the time when it was seized. I have, certainly, I acknowledge, had considerable doubt whether the object of the duty was not vinegar properly so called, intended to be used as vinegar for the accustomed purposes of that article in life, and it occurred to me primarily that it was. There is no doubt that vinegar may be made in various ways, and with different materials, and it seems to be applied to many other purposes than its principal one, and among others for the making this article of blacking; and if an inferior sort of vinegar, calculated for making blacking only, would be liable to duty in the hands of a vinegar-maker, I see no reason why it should not in the hands of a blacking-manufacturer; and if so, the mixture of other ingredients protecting it, is an idle notion. The act does not look to the sale as in the form of vinegar only; and the arguments of the Crown, drawn from the statute of *Anne*, as it regards the makers of pickles, are fair; but they leave the other questions open. With regard to white lead makers, that statute is express; but it is strictly confined to that, and therefore it should seem that all other persons are liable. Suppose a distiller buys immense quantities of vinegar for distillation, it must pay the duty. So if finding it cheaper, he makes it, but not to sell as vinegar, but as a refreshment compounded of it, he would still, I take it, be liable. This may perhaps be a very inferior kind of vinegar, but it is vinegar; it is made by the defendant, and he

he sells it as blacking. I am therefore of opinion that he is within the act.

WOOD, *Baron.*—I do not mean to differ from my Lord Chief Baron, and my brother *Graham*, but to express some doubts which I have had on this question.

I confess, it struck me that the meaning of the act was, that the liquid should be made vinegar, in the common sense of the word, and sold as such; and as it is a penal law, I doubted whether it ought to be extended beyond the letter. But this was vinegar, no doubt; and if the jury had thought that being sold under a different denomination, as blacking, was a pretext merely, it would have been a fraud, and the verdict could not have been otherwise; but there being no question of fraud in this case, I had considerable doubt on it: but notwithstanding those doubts, I do not mean to dissent in this case from the opinions already expressed.

GARROW, *Baron*, of the same opinion.—I think this verdict may be supported on the broad fact of the liquid being a preparation for vinegar, not to be used as vinegar, but to be sold as blacking. Our attention has been called to the necessity that this liquid should have been intended for sale as vinegar, in the general acceptation of that word; but I do not think that at all necessary to bring the defendant within the statutes. [His lordship then adverted to the statute of *Anne*.] What is the principle which should exempt a blacking-maker more than

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a maker of pickles? and an express enactment appears to have been thought necessary to exempt white-lead makers.

This person formerly bought vinegar for the same purpose, and if that was not protected from the duty, the ultimate application of it is not to be taken into consideration. As to any argument arising from favouring commerce, even if blacking were an article of considerable exportation, that is not a topic for guiding our judgment, whatever weight it might have in another place. It appears to me that the direction and verdict are quite right, and that therefore the rule must be discharged.

Per Curiam.

Rule discharged.

Saturday, 21st June.

BEDINGTON v. SOUTHALL.

The Court requires strong facts, and to be distinctly stated, in cases of setting aside an award; and a denial of any such is conclusive.

All the witnesses of the party against whom the award is made must have been examined, and in his presence, or it will be a ground for setting the award aside; but that must be made clearly to appear.

Quære, if it be not necessary to show that such examination was, in point of fact required; or whether a witness, having been named as to be examined, be not a requisition.

JERVIS now showed cause against a rule obtained by *Puller*, for setting aside this award for settling the differences between the parties in certain matters

matters of mutual account, on affidavits, the short substance of which was, that the parties having met on the 5th of *April*, a postponement to the 12th, at the instance of the plaintiff, was agreed on; that on that day a witness of the defendant having been examined by the arbitrator, (a private person,) on the part of the plaintiff, in the absence of the defendant and his attorney, (on *Saturday*, the 12th *April*,) it was agreed that he should attend again to be examined, on oath if required, as well as certain other persons mentioned on his part, whom he proposed to examine as to certain items added to the plaintiff's bill since the delivery of his bill of particulars;—that, subject to that arrangement, the reference was proceeded in, and closed for that day;—that none of the plaintiff's witnesses were examined by the arbitrator in the presence of the defendant or his attorney, so that he had had no opportunity of cross-examining them; and that on the *Monday* following, (the 14th,) the arbitrator, notwithstanding, made his award at the office of the attorney for the plaintiff, giving a balance in favour of the plaintiff, whereas it was said it should have been in favour of the defendant; and partiality towards the plaintiff was suggested.

Affidavits were now read on the part of the plaintiff. The arbitrator swore, that he adjourned the meeting of the 5th *April* in consequence of the defendant having brought in a larger account than that of the plaintiff, as delivered under the Judge's order, for a delivery of particulars;—that one of the plaintiff's witnesses having come a long

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way, he examined him then to save expense;—that on the meeting on the 12th, the plaintiff, his attorney and witnesses, attended at ten in the morning; but as the defendant's attorney did not attend till two hours afterwards, he examined the witness alluded to on *the part of the plaintiff*;—that on the arrival of defendant's attorney, he examined both the plaintiff and defendant, and several witnesses on the part of the defendant, which lasted till five o'clock, when he considered the evidence on both sides closed;—that the bonds expiring on the 15th, he made his award on *Monday*, the 14th. The affidavit of the plaintiff's attorney corroborated the statement of the arbitrator, and denied that any agreement was made on the 12th of *April* for examining any other witness on a future day.

RICHARDS, *Chief Baron*, having gone through the circumstances, from which his Lordship said, that in his view, though the affidavits on both sides were very inconclusive and deficient, it appeared to be clear that the defendant's witnesses had not been examined; held, that the arbitrator was bound to examine his witnesses, and in his presence; and that not having done so the award ought not to stand. As to the other fact, of an arrangement to examine them on a future day, that having been denied, was put out of the question.

GRAHAM, *Baron*, was of opinion, that as no corrupt partiality had been established against the arbitrator's character, the Court were bound to protect

tect him in the course of his duty; and observed, that the fact of the defendant having been surprised was not fully made out, as it was not stated that he was preparing his witnesses when he received the award.

WOOD, *Baron.*—It certainly strikes me in the same way; and I think there is not sufficient ground for setting aside this award. The circumstance of further witnesses being agreed to be examined on the part of the defendant, is denied, and that is therefore out of the question. Had the witness been distinctly required to be examined before the award was made, the arbitrator would have done wrong; but that is not made to appear. It is not stated that any such requisition was made, either on *Saturday* or on *Monday*, or that the witness had been prepared; and it is not enough to induce a Court to set aside an award, that it is stated loosely, that some of the party's witnesses were not examined, or in the party's presence.

GARROW, *Baron.*—It is quite true that Courts of Justice should give their support to judges of the party's own choice; and holding this judge of a domestic forum by no very strict rule, it is quite clear that this award cannot stand. It is not denied that one of the witnesses meant to be examined on the part of the defendant, underwent a long examination on the part of the plaintiff, in the defendant's absence; and it does not appear that he was ever again examined afterwards; and he might

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might have been examined on the *Monday*, and then the award would have been good. The arbitrator was bound to have appointed a day for the examination of the witness, otherwise the award could not have been expected, and must have been a surprise; it is not to be supposed that an arbitrator will proceed to make his final arbitrament before the witnesses named to him have been examined, and therefore a formal requisition that he might be examined is out of the question. In the mean time, however, he finds his way to the office of the plaintiff's attorney, and there makes his award. It seems to me, too, to be quite clear that he was making preparation for examining this witness throughout.—The decision therefore was *ex parte*; and however justly an arbitrator may decide without hearing all the evidence, it can never be satisfactory. The plain, short objection is, that this arbitrator has disappointed the party.

Rule discharged.

The

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Friday, 13th June.

The ATTORNEY GENERAL v. HORTON.

——————— v. CROTHALL.

It is not a fatal variance (after verdict) where an information, professing to set out the title of an Act of Parliament, describes it as intitled an act (&c.) for repealing duties on salt, and the drawbacks (&c.) "*thereon*"—the title being (in fact) in the same words, with the exception of having the word "*thereout*" instead of "*thereon*:" (and adding) and for granting other duties (&c.) "*thereon*;"—the concluding word being the same.

VERDICTS having been given for the Crown, on the trial of these informations, against the defendants, for smuggling into *consumption* a large quantity of their *fishery*-salt, contrary to the 38 Geo. 3, ch. 89;

Jervis now moved for a new trial, on the ground of a variance between the information which professed to set out the title of the act of parliament under which this proceeding was instituted, and the true title of the act—the information stating it to be intituled "An Act for transferring the management of the salt duties to the commissioners of Excise, and for repealing the duties on salt, and the drawbacks, allowances, and bounties *thereon*," the act having it "*thereout*" (and adding) "and for granting other duties, drawbacks, allowances, and bounties *thereon*."

Another ground of objection was taken to the evidence against the defendants, not amounting to proof of the particular offence charged by the

Evidence of deficiency in a fish-curer's stock of fish-salt, herring-hang, under a misrepresentation of the contents, and other suspicious circumstances, having been left to the jury to say whether he had *delivered salt to a person not being a fish-curer, contrary, &c.*—held to have been properly so left, and to be sufficient to sustain a verdict for the Crown on such a charge.

11th

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11th count. The allegation was, that the defendant being a fish-curer, &c. and having a quantity of salt delivered to him free of duty, according, &c. *did, before &c. deliver to certain persons, to the Attorney General unknown, not being fish-curers*, &c. a great part, to wit, 3,000 pounds weight &c. contrary, &c. whereby, &c.

The evidence was, that the defendants had given money to the officer to put down in his specimen-paper, a greater number of barrels of herrings as branded, than he had in fact branded; that having communicated that to another officer, they took measures for detecting him in defrauding the revenue. On going to weigh the defendants stock of fish-salt, they found none, at a time when he ought to have had 121 bushels* and 16 pounds. On the 18th *Nov.* the officers observing the cart and horses of one of the defendants at his herring-hang, and concluding that it was there for the purpose of smuggling away salt, turned off, and waited till the cart was in motion, when they came forward with some soldiers, whom they had procured in the mean time, and inquiring of the men who accompanied it, what they had in the cart, they said "seed wheat." They then proceeded to search the cart, when the men ran away, and they found that it contained five sacks of salt, which they seized, as well as the cart and horses.

It was objected, that whatever other offence such evidence might prove the defendants guilty of, it

* A bushel weighs 56 pounds.

afforded

afforded no proof of the illegal delivery of the deficient salt, as charged in the count.

But the Court were of opinion, that taking the whole of their various transactions together, it was a proper question to be left to the jury, and was proof sufficient to sustain their verdict, finding that the defendants had illegally delivered the salt, charged by the information to have been smuggled into consumption contrary to the statute.

As to the other objection, they held, that the variance was not such a one as was so fatal to the information as to entitle the defendant to have the verdict now set aside, and therefore, the rule was

Refused.

BUTTS

1817.

Wednesday, 18th June.

A bankrupt having obtained his certificate under a joint commission issued against him and others, is not estopped, when suing a stranger in trover, from controverting the validity of the commission, or from taking advantage of its illegality, as against such stranger, between whom and the plaintiff there is no reciprocity.

Quære, whether a joint commission, sued out against three persons, pending two previous separate commissions against two of them, is valid in *law* as against the third, and whether the assignees appointed under the two former commissioners, (who were also assignees under the last,) can maintain an action of trover to recover property of such third person jointly with him; or whether it be absolutely void at law, so that the person who is the object of it cannot so join in the action: or whether such subsequent commission be merely voidable, and suspends his right to join till the former commissions are established, or the last superseded?

The Court will not infer, or take notice of, any fact, not expressly stated to have been found by the jury, in an argument on a special verdict.

BUTTS and others *v.* BILKE and another.

THE plaintiffs,—who were the assignees of *Alexander Geddes* and *Thomas Milliken*, under two separate commissions of bankrupt, (and also assignees of *George Geddes*, *A. Geddes*, and *T. Milliken*, under a subsequent joint commission against all three of them,) and *George Geddes*, (who were all three formerly partners in trade, and joint owners of the ship *Satyr*,)—brought this action of trover against the defendants, (the sheriff of *Surrey*, and a judgment-creditor,) to recover the ship *Satyr*, which had been seized by the sheriff, under a *fieri facias*, at the suit of the other defendant.

The cause was tried at the *Surrey* Lent Assizes, 1814, before *Thomson*, Chief Baron, when it having been objected, on the part of the defendants, that *George Geddes*, being a bankrupt, and having therefore no property in the ship, had no right to sue the defendants in this action of trover, the learned Judge held, that as the plaintiffs had

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bound themselves by the third joint commission, they could not therefore maintain the action, and accordingly nonsuited them.

It was moved, on the part of the defendants, that that nonsuit might be set aside, and a new trial granted, on the ground that the action was maintainable by *G. Geddes*, notwithstanding the commission of bankruptcy against him.—The rule having been granted *,

1814.

TRINITY, *Tuesday, 14th, Wednesday, 15th June.*

Nolan, *Comyn*, *Gurney* and *Bolland*, for the defendants, now showed cause.

They contended, that as these three commissions could not stand together, the two separate commissions were superseded by the third joint commission; and that, as by that commission the property of *Geddes* in the ship had been divested, he had no longer any right or title remaining in him on which he could support the present action.

They submitted, that whatever might be the practice in regard to concurrent commissions, several months having intervened between the two separate commissions and the third joint commission, precluded all argument on that ground in favour of the former, in the present case;—that pending the prior commission, the last might perhaps be voidable, and by taking the proper course

* For the facts of the case, see the special verdict, *infra*, pp. 250 to 254.

it

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it might have been annulled; but that had not been done; and here the assignees under each commission are the same persons, and must therefore necessarily be estopped from controverting the validity of either of the commissions; and so as to *Geddes*, who had acquired his certificate under the third commission, and was therefore precluded from denying its legality. So far has the doctrine been carried of a bankrupt being bound by a commission to which he has submitted, that, as was observed in *Haviland* v. *Cook (a)*, by Lord *Kenyon*, even in the case of a fraudulent bankrupt, capital punishment was inflicted for concealing part of his effects, because the person himself had submitted to it.

They then submitted, that, according to the practice, joint commissions were preferred in Courts of Equity, as they were more efficacious, both on account of their more fully reaching, and more satisfactorily distributing, the bankrupt's effects among all the creditors;—that in the present case it was quite clear that all parties interested had assented to the subsequent commission for the benefit of all, and beneficial arrangements should be supported, and particularly in cases of bankruptcy;—and they observed, that it appeared from all the cases, that the Chancellor had the power to supersede a former commission, and suffer the subsequent commission to stand, all of which was in Courts of Equity mere matter of arrangement;

(a) 5 T. R. 656.

and

and therefore until the other commissions were formally superseded, any one was as much in force as the rest. Thus in *Lees, ex parte (b)*, the Lord Chancellor, (after adverting to the inconsistency of the decisions, which hold, that a bankrupt uncertificated has no property, yet may acquire it by action, declaring at the same time that they are settled points, and cannot be disturbed,) refused to supersede a second commission against an uncertificated bankrupt, holding that it was discretionary in the Court whether they would supersede the second commission or not, where the second was sued out a long time after the first; and in *ex parte Crew (c)*, the Lord Chancellor said, "We are now in the habit of superseding the one or the other, as may best answer the ends of justice." In *Proudfoot, ex parte (d)*, also, the Chancellor (Lord *Hardwicke*) refused to supersede a second commission.

They anticipated that many cases would be cited to show, that where a subsequent commission was sued out against a bankrupt, pending a former, it was void; but they submitted, that the present was quite distinct from any of those, from the circumstance of there having been no previous commission against *George Geddes*; and that, therefore, as to him, the doctrine for which those cases would be cited did not apply; for as to him, there was clearly some property not divested under the former com-

(b) 16 Ves. 473. (c) 16 Ves. 237.
(d) 1 Atk. 252.

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missions, on which the subsequent joint commission might operate; and, therefore, the principle on which all those cases proceed—that there can be no effects belonging to an uncertificated bankrupt, so that a subsequent commission must be nugatory—could not apply here; and the result of all those cases furnishes the distinction of such commissions being merely voidable.

On the whole, they submitted, that the second commission was at most merely voidable, and not void;—that, until it was avoided, it remained in force, at least so far as to take away from the person who was the object of it the right of maintaining, in a Court of Law, such an action as the present;—and that if any thing further were wanting to defeat that right, his having conformed, and obtained his certificate under that commission, would, as to himself, completely preclude him.

Dauncey, *Marryatt*, *Lawes*, *Abbott*, and *Taddy*, for the plaintiffs, insisted, that whatever might be the doctrine in equity, in law, the third commission, pending the former, was a mere nullity as against all the parties; and to all intents and purposes absolutely void;—that as to the two partners who had been declared bankrupts under the separate commission, and who had not under those obtained their certificates, the third commission was clearly null and void; for there could be no property in them on which a subsequent commission could attach. If, therefore, it be void in part, it must be void entirely; if void against any one, it must be void

void against all; for whether a commission be to be considered in law as an action, or an execution, it is an entire proceeding, and cannot be good in part, and bad in part. If either of the persons in a joint commission be an infant, or not in trade, &c., the commission cannot be proceeded in against any of the others. *Ex parte Martin (e).*

[The Court here intimated, that holding the joint commission valid would contribute more to effect justice between the parties in such a case, for otherwise, they inquired, how is a joint creditor to prove his debt under the separate commission? And they observed, that under a joint commission separate effects might be seized, but not *vice versâ*; and that if the last commission were void, the creditors would have no remedy against *Geddes*; for in such a case the Chancellor could not interfere, because he could not give effect to a void commission. And they suggested that a subsequent commission might possibly (as it had been put in argument) be good against all three, as operating on the property of the third party not affected by the former commission.]

It was then urged, that the course in such cases was to give effect to the last, by the Chancellor regularly and formally superseding the first—that until that were done the first would be in force, and the last must therefore necessarily be nugatory; and therefore it is never required to be actually superseded as the first is. And they pressed the dis-

(e) 15 Ves. 115.

 tinction

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tinction already taken of the effect of a subsequent commission, pending, *à priori*, in a court of law contradistinguished from what might be done in a court of equity, where a power of arrangement in such cases is inherent, and may be exercised at discretion, so as to cope with the legal difficulties of the case. However courts of equity may be disposed to favour joint creditors, in law they are equal; and in courts of law no argument can be drawn from hardship or inconvenience.

The reason and principle of the rule too, they submitted, were strongly in favour of a commission against an uncertificated bankrupt being in all respects a nullity; and it would be dangerous if it were not so, as otherwise such a person might be a second time subjected to all the perils of the bankrupt laws, for no object, and without a shadow of benefit to the creditor.

As to the argument that *G. Geddes*, by having taken the benefit of the commission issued against him, was estopped from denying the validity of that commission, that is founded on a misconception of the nature of estoppel, as defined by Lord *Coke(e)*, who says, that 'every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that, regularly, a stranger shall neither take advantage, nor be bound by the estoppel.' Here there is no such reciprocity as is so held to be necessary to every estoppel. But if they were estopped

(e) 7 Inst. 352, b.

from

from denying the assignment on the certificate, &c. they would not be estopped from saying that the commission was null and void. At all events the Court would not be estopped from deducing the inferences of law from the statement of the facts. That the defendants are not estopped, is quite clear; and if they are not, the other parties cannot be. Lord *Coke* also says, 'where the veritie is 'apparent in the same record, there the adverse 'party shall not be estopped to take advantage of 'the truth; for he cannot be estopped to allege 'the truth when the truth appeareth of record.'

[GRAHAM, *Baron.*—My difficulty is, that if we, a Court of Law, declare this third commission void, the Chancellor may hereafter, to meet the justice of the case, pronounce it valid, and make it the groundwork of all his future proceedings under the bankruptcy.

RICHARDS, *Baron.* And if he should supersede the first, it would make the other valid, even in a court of law.]

The Chancellor cannot direct the opinion of a court of law, but he may prevent the effect of it from working a prejudice to any of the parties to the proceeding, by controlling its operation *inter partes.*

In support of the doctrine, that there could be no valid commission, they cited the following cases:

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BUTTS and others v. BILKE and another.

In *Martin* v. *O'Hara (f)*, it was held by Lord *Mansfield* and Mr. Justice *Buller*, that a second commission against a bankrupt, pending a former commission, was void, because he is incapable of trading or contracting for his own benefit, and all the property he acquires belongs to his creditors; therefore a second commission could have no object, and would be idle and nugatory. So in *ex parte Martin (g)*, the Lord Chancellor held, that a second commission against an uncertificated bankrupt could not be maintained; and there, too, it was decided, that a subsequent joint commission against the bankrupt and another person, could not be sustained against such other person, because it would not be good against the bankrupt, which is precisely this case; and leaves no foundation for the distinction taken between a void and voidable commission.—They also cited to the same point, *Cook, ex parte (h)*, *Rhodes, ex parte (i)*, *Crew, ex parte (k)* and *Brown, ex parte (l)*, *Mason* and others, *ex parte (m)*.

To establish the point, that if a joint commission of bankrupt were not good against any one of the parties named in it, it would not be a valid commission against any of the rest, they again cited the case *ex parte Martin*, from 15 Ves. (*ante*),

(*f*) Cowp. 823.
(*g*) 15 Ves. 114. (See Amb. 630.)
(*h*) 2 P. W. 500.
(*i*) 15 Ves. 539.
(*k*) 16 Ves. 237.
(*l*) 1 Ves. & B. 61.
(*m*) 1 Rose's B. C. 423.

and

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and *Flower and others* v. *Herbert (n)*, where a witness was rejected by *Ryder*, Ld. C. J. as incompetent, on the ground that he, having obtained his certificate under a commission of bankrupt against him *and the defendant*, was interested to support it, which he would have an opportunity of doing, by proving what was necessary to the bankruptcy of the defendant; for if the commission were not good against the defendant, it would be be void against the witness, when his certificate would be void, and he would in consequence be again liable to his debts.

On such arguments, they submitted that the 3d commission was a nullity, and that therefore the right of the plaintiff, *George Geddes*, to bring and maintain the present action, was not affected by it.

Cur. adv. vult.

1814.

Wednesday, 29th June.

The Court having taken time to consider the case;

THOMSON, *Chief Baron*, now stated, that as the Court considered the question one of great difficulty and importance, and that as the objection resting on the point of, whether the third commission was absolutely void, or merely voidable, ought to be well weighed, as it was clear, from many of the cases, that the Chancellor frequently gave effect to such subsequent commissions, by

(n) 2 H. Bl. 279. n.

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superseding the first; the Court were of opinion, that the cause had not gone on far enough to develope the merits, so as to enable them to pronounce a conclusive judgment; and that, as the question required the utmost consideration, all the facts ought to be put on the record, for the purpose of receiving a solemn determination.

The cause was accordingly sent down again, and was tried before Mr. *J. Chambre*, Lent Ass. 1815, when the facts were brought before the Court, on the following special verdict, finding,

'That *George Geddes*, *Alexander Geddes*, and *Thomas Milliken*, in the year 1809, were co-partners, and as such jointly carried on the business of merchants, and sought their trade of living by buying and selling, and were also joint owners of the within-mentioned ship, a vessel, called the *Satyr*:'

'That whilst they continued in co-partnership, and were joint owners of the said ship, the said *Alexander Geddes* and *Thomas Milliken*, on the 22d day of *June*, in the year of our Lord 1809, respectively became bankrupts, within the true intent and meaning of the several statutes now in force concerning bankrupts; and that on the 24th day of *June*, in the same year, separate commissions of bankrupt, under the Great Seal of *Great Britain*, were issued against them, the said *Alexander Geddes*, and *Thomas Milliken*, upon the petition of *John Fisher*, to whom they, together with the said

said *George Geddes*, were then, and at the time of their becoming bankrupts, indebted in the sum of 450*l.*, and under which commissions they were respectively duly found and declared bankrupts by the commissioners named in the said commissions, and to which commissions they respectively surrendered themselves; and the plaintiffs, *John Butts*, *William Hardy*, *William Tate*, and *Thomas Wilkinson*, on the eleventh day of *July*, in the year aforesaid, were duly chosen, and at the time of the commencement of this action were assignees of the estates and effects of the said *Alexander Geddes*, and *Thomas Milliken*, and thereupon, on the said 11th day of *July* in the year aforesaid, two several assignments of the said estates and effects of the said *Alexander Geddes* and *Thomas Milliken*, of which they were possessed or entitled unto, either alone or jointly with any other person or persons, according to the true intent and meaning of the said statutes, were duly made to the said *John Butts*, *William Hardy*, *William Tate*, and *Thomas Wilkinson*, by the commissioners in the said commission named:'

'That neither the said *Alexander Geddes*, nor the said *Thomas Milliken*, have obtained any certificate of conformity under the said commissions, or either of them:'

'That on the 7th day of *November*, in the year 1809 aforesaid, a joint commission of bankrupt, under the Great Seal of Great Britain, was issued against

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against the said *George Geddes*, *Alexander Geddes*, and *Thomas Milliken*, upon the petition of the said *Thomas Wilkinson*, one of the said plaintiffs, to whom they were then, and at the time of their becoming bankrupts, indebted in the sum of 200 *l.*, and under which commission they were respectively found and declared bankrupts by the said commissioners named in the said commission, and to which commission they respectively surrendered themselves: and that on the 18th day of the same month of *November*, the said plaintiffs, *William Hardy*, *William Tate*, and *Thomas Wilkinson*, were duly chosen, and at the time of the commencement of this action were assignees of the joint and separate estates and effects of the said *George Geddes*, *Alexander Geddes*, and *Thomas Milliken*, under the said last-mentioned commission, by virtue of a certain assignment thereof to them made, bearing date the 18th day of *November*, in the year last aforesaid, by the said commissioners in the said last-mentioned commission named, except so far as the several matters herein found shall be deemed in law to affect or alter their right or title as such assignees as last aforesaid; and that on the 2nd day of *May*, in the year of our Lord 1810, the said *George Geddes*, *Alexander Geddes*, and *Thomas Milliken*, having respectively conformed themselves under the said last-mentioned commission, duly obtained their certificate under that commission:'

'That until, and up to the times when the said *Alexander Geddes* and *Thomas Milliken* respectively

tively became bankrupts, they and the plaintiff, *George Geddes*, were the owners and possessed of the said ship *Satyr*; and from thence until the time of the seizure of the said ship *Satyr* by the defendants, the plaintiffs, *John Butts*, *William Hardy*, *William Tate*, and *Thomas Wilkinson*, as such assignees as aforesaid of the estates and effects of the said *Alexander Geddes* and *Thomas Milliken*, and the plaintiff *George Geddes*, were the owners, and possessed of the said ship, except so far as the several matters herein found shall or may be deemed in law to affect or alter the right or title of them, or either of them, in the said ship:'

'That on the 24th day of *June* 1809, the said ship *Satyr*, at the instance and desire of the said *William Havelock*, was seized and taken in execution by the said *Edward Bilke*, as sheriff of the county of *Surrey*, under and by virtue of His Majesty's writ of *fieri facias*, to him directed, against the goods and chattels of the said *Alexander Geddes* and *Thomas Milliken*, upon a judgment received against them for the sum of 7,648*l.* 10*s.* in an action against the said *Atexander Geddes*, *Thomas Milliken* and *George Geddes*, at the suit of the said *William Havelock*, and in which said action the said *William Havelock* obtained judgment of outlawry against the said *George Geddes*:'

'That on the 18th of *July* in the same year, a writ of *capias utlagatum* issued against the said *George Geddes*, upon the said judgment of outlawry

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lawry in the last-mentioned action; and that the said *Edward Bilke*, as sheriff of the said county of *Surrey*, to whom the said writ was directed at the instance of the said *William Havelock*, and by virtue of the same writ, seized the said *George Geddes*'s share and interest in the said ship or vessel called the *Satyr*; and that the said *Edward Bilke* and *William Havelock* have, ever since the respective times of seizing the said ship or vessel as aforesaid, kept and detained, and still do keep and detain the same, under the said writ of *fieri facias*; and that some time after such seizure of the said ship, the said defendants had notice from the said *John Butts*, *William Hardy*, *William Tate*, and *Thomas Wilkinson*, as assignees as aforesaid of the bankruptcy of the said *Alexander Geddes* and *Thomas Milliken*:'

'That on the 31st day of *October* 1810, a writ of *supersedeas* upon a judgment of reversal of the said outlawry against the said *George Geddes* was sued out, and left at the office of the said *Edward Bilke*, as sheriff of the said county of *Surrey*:'

'That the present action was commenced on the 24th day of May 1813.'

'But whether, &c. &c.'

1817.

Wednesday, 18th June.

The case now came on for argument, when

Bolland

Bolland appeared for the defendants, and

Taddy for the plaintiffs; but on the special verdict being stated,

The Court were of opinion, that as the act of bankruptcy, &c. by *George Geddes*, were not stated as facts on the record, there *appeared* nothing to preclude the plaintiff *Geddes*, from maintaining the present action.

It being then suggested, that those facts could be supplied, or might be inferred, and that *Geddes* was estopped* by his submitting to the commission, from denying those facts, the Court said, that in a special verdict no such inference could be intended.

GRAHAM, *Baron*.—It is not stated in this special verdict, as a fact found by the jury, that *George Geddes* ever did commit any act of bankruptcy; and it is quite impossible for the Court to infer that he did; those were facts which it was most material to have found, and for which, in truth, this case was originally sent down.

As to the defendant *Geddes* being estopped to deny them by his having submitted to the commission, the doctrine of estoppel, as read from Lord *Coke*, is very strong to show that there could be

* That was answered, as on the former argument, by the positions from Co. Litt.

no

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no such estoppel in this case, which is not a question between the parties, but as affecting strangers; now these defendants never could have been bound by estoppel, and therefore, the plaintiffs would not; there is, therefore, no reciprocity.

From what appears on this verdict, *non constat*, that the act of bankruptcy ever was committed when the defendant seized the ship; nor is it stated how, or where, or what it was; and the right of *Geo. Geddes* was entire, unless he had then committed an act of bankruptcy: he was possessed of an undivided third part, or share. It was in *June* 1809, when this cause of action arose. A bankruptcy is alluded to, and an assignment; but the mere assignment, without an act of bankruptcy proved, will not convey a right of action. But even if the act of bankruptcy could have been inferred, the time no where appears; and therefore, there is no objection to the action on the facts before the Court.

WOOD, *Baron.*—Two of these persons having committed an act of bankruptcy, it is plain that their assignees were proper parties to bring this action. Then, as to *George Geddes*, what is there that appears in the special verdict to deprive him of his right to join for his own benefit in the action. It is stated that there was a subsequent joint commission against him and them; so there might be; but there is nothing stated to show that he had ever become bankrupt; and it is the peculiar nature of a special verdict, that every thing must be stated, and that nothing can be inferred: now where does it

appear

appear that he ever committed an act of bankruptcy? There is not a fact stated in the case with legal precision.

Then it is said that having taken the benefit of that commission, he is estopped. On that point, the Law, which has been properly stated from Lord *Coke*, requires that estoppels shall be mutual; here the defendants are strangers, and could not be estopped.

Suppose the assignees had sued without *George Geddes*, they must then have proved the act of bankruptcy by *all*, and all other necessary facts; for certainly the commission, assignment, and certificate alone, would not have been sufficient; and it would have been absurd to have offered them in evidence, on the ground of estoppel.

This action, therefore, I think, was properly maintainable by *George Geddes*.

GARROW, *Baron*, of the same opinion.—The proof of an actual bankruptcy was indispensable to defeat *G. Geddes*' right of action; and it cannot be inferred on a special verdict.

The want of mutuality, which is of the essence of estoppel, is an answer to the argument, that *Geo. Geddes* was estopped by this commission.

Postea to the plaintiff.

The KING *v.* HUNTER and others,

1817.
Saturday, 21st June.

On a writ of Extent in aid of ANDREW against URIE and others.

Where orders have been sent by an insolvent merchant to his agents abroad, to hold balances in their hands at the disposal of certain persons named by him, who are, in point of fact, appointed trustees for his general creditors, by a deed termed a deed of inspection, in which he relinquishes all claim to his business, but agrees to conduct it to the winding up, on their account, as their agent—held not to protect bills of exchange transmitted by such foreign agents, made payable to the insolvent, to satisfy balances due to him in their hands, from a creditor not a party to the deed, on whose behalf the sheriff has seized the bills, under an extent, whilst in his possession and unindorsed, against such a proceeding, resorted to after the arrangement, although the foreign agents have acceded to such arrangement; because, for want of a specific appropriation of the bills, and an express consideration *quoad* those particular bills, being shown to have been the foundation of their being assigned to the trustees,—and they were held to be the property of the insolvent merchant, notwithstanding the arrangement, and therefore lawfully seized.

Letters written by the foreign agent, assenting to the arrangement, received in evidence to prove such assent.

THE sheriff having under this extent seized certain bills of exchange in the possession of *Urie* & Co., and made payable to them specially, and unindorsed: *Hunter* & Co. pleaded that the said several bills in the inquisition mentioned, before and at the time, &c., and from thence, &c. were and are the property of said *Hunter* and Co. and that the same, at the several times of, &c. were in the possession of said *Urie* & Co. as the agents of said *Hunter* & Co., protesting possession by *Urie* & Co. as of their own proper chattels, or chattel interest, as by the said inquisition supposed. Replication taking issue.

The cause was tried before Lord Chief Baron *Richards*, at the sittings after the last term, when a verdict was entered for the Crown, by the direction of the learned Judge, on the ground that the

defendants

defendants had failed in proving a transfer of the bills in question from Messrs. *Urie* & Co. to them.

The point made for the defendants in this case was, that the bills seized under the extent arose from property in cash belonging to the defendants, which had been transferred to their credit abroad by orders from Messrs. *Urie* & Co., which orders had been accepted and acted upon; and in support of it the cases of *Lewis* v. *Wallis (a)*, *Winch* v. *Keeley (b)*, and *Williams* v. *Everett (c)*, were cited by their counsel on the trial.

The evidence of the first witness called on the part of the defendants (Mr. *Stratton*, one of the late firm of *Urie* & Co.) was rejected, on the ground of his being an interested witness. The second witness (Mr. *Austin*, who was clerk to *Stratton*) proved certain letters from the agents of *Urie* & Co. which were read by the associate, acknowledging the receipt of their order to transfer, and stating their having acted upon the order,—that from the date of the order (the 6th *March)*, Messrs. *Urie* & Co. ceased to carry on business on their own account, but were employed by the defendants as their agents, and carried on business for them, and by them they were paid; and witness produced a book kept by him containing an account of all the monies and bills received on account of the defendants, and wherein the whole of the bills in question were entered.

(a) Sir T. Jones, Rep. 222. (b) 1 T. R. 619. (c) 14 East, 582.

 A deed

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A deed of covenant (usually termed a deed of inspection) between Messrs. *Urie* & Co. and their creditors, was also produced, dated 1st *August* 1816, wherein the former covenanted with the defendants, as trustees for the creditors generally, to give up all their property in trust, &c. (they continuing to conduct their affairs until the same should be wound up) for the general benefit of the creditors; but to that deed *Andrews*, the prosecutor of the extent, was not a party.

The Chief Baron, however, objected, that the letter from Messrs. *Urie*, *Stratton*, and *M'Nair*, directing the transfer, did not state the consideration; and it being proposed to give parol evidence of the transfer of the consideration, his lordship thought that parol evidence was not admissible; and being of opinion that neither the letters produced, nor the deeds, were sufficient evidence of a transfer of the property, his Lordship directed a verdict to be entered for the Crown.

Bosanquet, Serjeant, having obtained a rule for setting aside that verdict in order to a new trial,

RICHARDS, *Chief Baron*, now read his report, from which it appeared to have been proved that *Urie* & Co. stopped payment the 4th *Mar.* 1816;—that they then wrote to their correspondents and agents abroad, enclosing orders to transfer their property, and all balances due to them, to the defendants; and that they afterwards carried on no more business on their own account, but acted as agents

agents for the defendants, and *Stratton* acted as their clerk. Messrs. *Fletcher* & Co., of *Leghorn*, having acceded to the arrangement, afterward corresponded with the defendants, whereby they recognized them as their future principals.—Those letters were objected to as not being admissible, but his Lordship overruled the objection.

The letters were as follows:—'To Messrs. *Hunter* & Co.—We are in receipt of your favour 6th instant, enclosing an order from Messrs. *Urie*, *Stratton* & Co. to hold any property belonging to them in our hands at your disposal. The whole of the goods consigned to us by said gentlemen are disposed of; we have only, therefore, to hold at your disposition whatever balance may appear due to them on winding up their accounts with us and our *Malta* house, which we shall do accordingly.'

The other letter was to Messrs. *Urie* & Co. apprizing them of the above.

The deed put in evidence was one now frequently in use, whereby the insolvent undertakes to conduct his business in future under the inspection of some of his principal creditors: the profits to be paid into the Bank, and a dividend made periodically,—the creditors to take no proceeding by attachment or otherwise,—and the inspectors to be entitled to an assignment when they shall require it; with power to the trustees, generally, to transact all matters and concerns relating to the trust-property thus placed entirely under their control,

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The bills in question had been mostly remitted by *Fletcher* & Co. to *Stratton, Urie*, and *M'Nair*, and arose from the balance due to them from the produce of their goods in the hands of *Fletcher* & Co.

His Lordship then stated that he had directed the jury to find a verdict for the Crown, under his opinion, that the bills were the property of *Urie* & Co., and not of the defendants.

Dauncey, and *Wilde*, now showed cause.—They contended, that notwithstanding the arrangement between the several parties, which it was said the letters proved, the property in the bills was not divested by that arrangement, so as to give the defendants a right against the Crown. The deed of inspection, they insisted also, could not in any way affect the present claim, because *Andrews* was not a party to it. That deed, besides, is not in fact an assignment, for that would have been an act of bankruptcy, and therefore it could not have passed any property:—that deed too is inconsistent with the previous orders adverted to as having been enclosed in the letters; and they insisted that the defendant had neither a legal or equitable right to the bills.

Bosanquet, Serjeant, and *Gaselee*, in support of the rule, contended that the bills were the property of the defendants under the particular circumstances of this case. The debt of *Fletcher* & Co. had been assigned to the defendants in satisfaction of a debt

due

due from *Urie* & Co. to them, as it might legally have been, *Israel* v. *Douglas (a)*, and a debt so assigned has been held not liable to be attached for the debt of the assignor, *Lewis* v. *Wallis (b)*.— The letters did not require a stamp, as a debt is assignable by parol as well as by deed, *Heath* v. *Hall (c)*. In consequence of the arrangement effected by the letters and the deed, *Hunter* & Co. transact all the business of the late firm of *Urie* & Co., pay debts, and receive them, and take on themselves all responsibilities. *Urie* & Co. could, under the circumstances, have only received the bills as the agent of the defendants; and there had been a valid appropriation of the bills to *Hunter* & Co. by the express consent of all parties, and therefore they were not liable to be seized while in the hands of *Urie* & Co. by this extent against them.

Dauncey, in reply, distinguished the present case from that of *Israel* and *Douglas*, because there was in that case a regular integral debt due from the party to the assignee, which was specifically appropriated by the assignor: whereas in this instance there was no such debt, for notwithstanding the defendants might have been in fact creditors of *Urie* & Co. who might possibly have assigned to them these debts, yet no precise engagement with respect to these particular bills is proved, nor does any express consideration for the transfer, or any specific appropriation, any where appear.

(a) 1 H. Bl. p. 239. (b) Sir T. Jones's Rep. 222.
(c) 4 Taunt. 326.

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On that ground the Court held, that the issue on the part of the defendants had not been sustained, and therefore they discharged the rule.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

Coram, RICHARDS, Chief Baron.

(In Equity.)

LEONARD *v.* FRANKLIN.

23d June.

A book, from the Registry of *Lincoln*, containing, *inter alia*, what were called copies of endowments of certain vicarages, was received as evidence of an endowment of a vicarage in *Northamptonshire*, by the Lord Chief Baron (giving up considerable doubt) on the production of cases wherein it had been received before.

THE plaintiff in this cause (a suit for tithes, by the vicar of *Newbottle*, *Northamptonshire*), proposed to give in evidence an entry in a very old book, produced from the registry of the diocese of *Lincoln*, appearing to be a collection of ecclesiastical notices, compiled by *Hugo Wells*, formerly bishop of *Lincoln*; among which were many abstracts of various endowments of different churches, and one of them was that of the vicarage of *Newbottle*. It was without date or title.

The production of that book was opposed by *Martin* and *Temple*, as not being evidence; because it was a mere private collection of documents, (which might or might not, be genuine, or fabricated,) as matter of curious research, but which were by no means authenticated or verified. It was also objected, that the book was not even in the nature of an official book,

book, nor was it a public writing;—that it did not profess to relate to the county of *Northampton* *, but was, on the contrary, compiled (as it was said) by the bishop of *Lincoln*, and kept in the registry of that diocese. The custody, therefore, was another insurmountable objection; the possession being no way connected with any interest in the vicarage of *Newbottle*, nor derived from any person in any way concerned with the vicarage.

Dauncey and *Hall*, contending for the production of the book, relied on its having been received before on various occasions.

The Lord Chief Baron intimated that his impression was against admitting the book as evidence in the present case, on the objections taken; but if it had been admitted on former occasions, his Lordship said, that he should yield to the authorities; and he ordered the cause to stand over, to give an opportunity of bringing forward any case in which it had been admitted.

On this day the counsel for the plaintiff mentioned the cases of *Halse* v. *Eyston* (*a*), and *Hebden* v. *Freeman* (*b*); and *Dauncey* also adverted to

* *Northamptonshire* was *formerly* within the diocese of *Lincoln*, and continued to be part of it till the reign of *Hen.* VIII., when the diocese of *Peterborough* was carved out of that of *Lincoln*; and the book in question came from the episcopal registry of the diocese of *Lincoln*.

(*a*) 25 Jan. 1809 †. (*b*) 22d Nov. 1810 †.

† These cases will be reported in an Appendix at the end of this Vol.

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its having been admitted at *Nisi Prius*, on the *Oxford* circuit, in a case of *Harwood* v. *Sims* (c), when

The Lord Chief Baron admitted the evidence.

Account decreed, with costs.

(c) That case is noticed in Wightw. p. 112, for another point.

IN THE EXCHEQUER CHAMBER.

Coram, RICHARDS, Chief Baron.

RUMNEY v. MORGAN.

Same day.

3 Y. & C. 676

A cause cannot be heard against some of several defendants, in the absence of the rest, although it is not intended to proceed against them.

The bill must first be formally dismissed, as to them.

THE Lord Chief Baron, finding that some of the defendants in this cause did not appear at the hearing, refused to let it proceed; for, said his Lordship, on its being intimated that it was not intended to ask any decree against them, they are parties still, and I cannot hear the cause against some of the defendants while there are others on the record in their absence; and unless the rest are no longer before the Court, the bill being dismissed as to them, I might be called on to hear the cause over again, if I were to go on with it now.

Let

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Let it stand over, that the bill may be dismissed as to the defendants, against whom it is not intended to proceed; and let those who now appear have the costs of the day.

IN THE EXCHEQUER CHAMBER.

Coram, RICHARDS, Lord Chief Baron.

(In Equity.)

GILLIBRAND *v.* SCOTSON.

Monday, 23d June.

Where a modus set up by way of defence to a bill for tithes, against the occupier of a certain farm, was pleaded thus—"*that the said farm is parcel of the demesne lands of a certain mansion-house called, &c.; and which comprises, &c.; for which, from time, &c. the modus has been payable by the proprietor of the said mansion-house and demesne lands,*" it was held to be ill laid, for want of a sufficient description of the lands claiming to be protected by it.—And that although the payment was clearly proved; for pleading a modus for a whole district, and then averring that the particular lands are part of such district, without describing it by metes and bounds, is insufficient and bad, and cannot be aided by the evidence supplying the description by its boundaries.

Therefore an account was decreed, but *without costs*, in consideration of the merits of the defence.

TO this bill, which had been filed by the lessee of a rector, for an account of the tithes (generally) of a certain farm in the occupation of the defendant, called *Astley Hall Farm*, containing 120 acres, the following defence of modus was put on the record by the answer, "that the said farm is parcel of the demesne lands of a certain mansion-house,

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house, called *Astley Hall*, situate in the said parish of *Chorley*, and which said demesne lands, are usually called *Astley Hall Demesne*, and comprise altogether about 219 A. 3 R. 36 P.; and he believes and insists that from time, &c. a certain modus of 40 *s.* a year hath been payable to the rector of the parish of *Croston* *, and now is payable yearly and every year at *Easter*, or as soon after as demanded by the proprietor of the said mansion-house and demesne lands, for and in lieu and full satisfaction and discharge of all the tithes yearly arising upon the whole of the said demesne lands."

Thursday, 12th June.

To that defence so pleaded, *Martin* and *Roupell* objected, that the modus was improperly laid, both in respect of the lands alleged to be covered by the payment, and also in respect of the person by whom it was to be paid; for that the description of a farm as being part of an ancient demesne, without setting out metes and bounds, either to the whole, or the part (which was essentially necessary to such a plea as the present,) was insufficient, and destructive of the defence—*Croft* v. *Ayer* (*a*), *Scott* v. *Allgood* (*b*)—and that the term, demesne lands, was vague and uncertain, and unknown in legal proceedings, except when applied to the Crown, or the lord of a manor.

* The township of *Chorley* was separated from the parish of *Croston* by act of parliament, (33d *Geo.* 3d,) and made to constitute a distinct parish.

(*a*) 4 Gw. 1325. (*b*) Ib. 1369.

They

They objected, also, that the modus was alleged to be payable by the proprietors, whereas it should have been stated to have been payable by the occupier, for he is the ostensible possessor, and to him it is, and not to the proprietor, (whom it might often be difficult to ascertain or find,) that the clergyman is to apply for his tithes.

Dauncey and *Blake* submitted, that the description was in both respects sufficient in an answer, adverting to the distinction recognized in the case of a bill. The present description, though general, is obvious, and well known, and is much the same as that of "ancient orchard," which has always been held to be sufficient. If, however, the laying of this modus should be somewhat loose, yet where there is evidence, as here, of a long-continued payment, the Courts have always supplied the deficiency in pleading, and have suffered the defence to go to an issue, and they cited *Mallock* v. *Browse* (c), and *Ord* v. *Clarke* (d). The latter case they put also in opposition to the second objection, of the modus being laid as payable by the proprietor. They then submitted, that the extent of the lands stated to be covered, having been set out by number of acres, was sufficient, as was held in *Vyse* v. *Dunne* (e), and *Atkins* v. *Hatton* (f).

(c) 3 Gw. 905.
(d) Gw. 1437, and Anstr. 638.
(e) Gw. 1124.
(f) 4 Wood, 412, 415.

In

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[In this stage of the cause, the Lord Chief Baron intimated a desire to hear the evidence, which was accordingly read, and it appeared, from the depositions, that the payment alleged to be a modus had been made as far back as memory and reputation extended, and that no tithe had ever been paid or demanded for *Astley Hall Farm*, within living memory; and one of the witnesses *described its boundaries*.]

Martin then insisted, that even if the modus should be held to have been well pleaded, as put on the record by the answer, it had not been proved as laid, which was equally necessary; for none of the witnesses have described the lands claiming the protection of the modus as they are described in the terms of the answer. He then adverted to the language used by the witnesses, who spoke of *Astley Hall Farm*, whereas the pleadings called it so many acres, part of *Astley Hall Demesne*; and he pressed the indefinite description and vague uncertainty of the expression, demesne, which, if it meant any thing, could only signify lands in the occupation of the lord of the manor, and could no longer be considered as demesne, when not in his occupation, any more than a park when disparked. The case of an ancient orchard, he submitted, was an exception to the rule, and that on the ground of "ancient orchard" being a precise description, because it was ostensible, and obvious to the sight; whereas demesne lands afforded no such intelligible or visible designation.

And

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And he contended, that to support the present defence every requisite was wanting;—for that the lands stated to be covered by the modus were not (as they ought to be) accurately and clearly described by name, quantity of acres, and *their known metes and boundaries*;—that the proof did not accord with such description; and that the lands were not clearly shown to be the same as were sought to be protected by the modus.

Adv. vult.

23d June.

RICHARDS, *Chief Baron.*—The defendant has set up a modus, by way of defence to this bill for tithes, of 40*s.* a year, said to be payable for certain demesne lands called *Astley Hall Demesne*, of which the defendant's farm is stated to form a part. In support of the modus there was certainly much evidence offered of the payment of it, and of non-perception of tithes in kind, for a great length of time, though that evidence applied sometimes to the whole estate, and sometimes to this farm only. An objection was taken to the manner in which the modus is pleaded; and certainly, it being stated to be applicable to the general estate, and not to this particular farm, there ought to have been some more intelligible description given of the property to which the modus is applicable. If it had applied to this farm only, the description of it would have been sufficient; but it goes much beyond that, for it is said to apply to the whole of *Astley Hall Demesne*; and with respect to that, there

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there is no statement of metes and bounds of any kind, or any thing to show the clergyman the situation and extent of the place claiming the protection of the modus. If, therefore, it be applicable to a larger estate, the description of the part claiming under the exemption of the whole is not sufficient; for notwithstanding so much exactness of description is not necessary in an answer as would be required in a bill, yet it must necessarily state something by way of description of the particular lands claiming to be covered by the modus set up; but here, there is nothing of that sort stated, and it is impossible to apply the evidence so as to supply that deficiency. Therefore, with considerable reluctance, I feel myself bound to say, that I think the description of these premises, as furnished by the answer, is not sufficient to show that they are part of a definite estate, alleged to be protected by the modus set up, so as to entitle the defendants to succeed in that defence. The Court could not effectually decide on the modus as pleaded, and therefore it is of no value.

At the same time, considering the merits of this case, it is quite idle in these parties to persist in the suit; and they should in the mean time come to some understanding with each other; for if the same application should be made to the Court hereafter, by another bill, the defendant will be enabled to make a better case, and a further inquiry must then be the inevitable result: because the payment of 40*s.* is perfectly clear upon the evidence, and it does

does not appear that any thing else has ever been paid: and if this had been laid as a farm-modus, and the lands had been properly described, the defendant would have been clearly entitled to an issue.

But the short objection to it, as at present stated, is, that you can not plead a modus as covering a certain district, not described by its metes and bounds, and then say that the defendant's lands, which are also not described by metes and bounds, are part of such district.

The consequence of the modus having been badly pleaded, however, at present is, that there must be a decree for the account prayed by the bill, but as the defendant's case appears to have been a good one, it must be without costs.

Account decreed. *

* Vide *Wolley* v. *Hadfield*. *Ante*, vol. 3. p. 210.

JACKSON

IN THE EXCHEQUER CHAMBER.

Coram, RICHARDS, Lord Chief Baron.

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Thursday, 19th June.

JACKSON and others *v.* RADFORD and others.

The Court will require a plaintiff (proceeding against a defendant for specific performance of an alleged agreement for a mortgage entered into by the defendant's testator, for securing money advanced to him on such agreement and other debts; *and also* for an assignment of a bond alleged to have been satisfied by the plaintiff's testator, and constituting part of the plaintiff's demand,) to elect one of such objects of the prayer of his bill, on the ground of inconsistency in the application for both, at one and the same time.

Note.—The plaintiffs having elected to pray an assignment of the bond, a reference to the deputy remembrancer was ordered, to ascertain the fact of the payment of the debt, and if paid, the nature of it.

Such an assignment not being available, the Court would direct (if they relieved the plaintiff,) that the obligees shall permit their names to be used by the plaintiff in putting it in suit.

It is the practice in equity to keep a heir at law before the Court, even though he admit the will; *semble*, for the purposes of giving more complete effect to any decree which the Court may make, and which might require his concurrence.

THE plaintiffs in this suit were the executors of *George Jackson.*—The defendants were the devisees, trustees, and heir at law of *Samuel Brundrett*, deceased, and *Jones* & Co., who were bankers.

The bill stated, that the testator, *Brundrett*, had become indebted to the testator, *Jackson*, in 500*l.*; —that *Brundrett* had become bound, as surety, in a bond to the defendants, *Jones* and Co., for securing the sum of 1600*l.* to be paid to them by the principal, *Royle*, who had an account with them to the amount of 800*l.*; and that he *(Royle)* had become indebted to them in 750*l.* 11*s.* 6*d.* on the balance of that account—that *Brundrett* had proposed to *Jones* & Co. a mortgage on certain

freehold

freehold and leasehold estates, his property, which they had refused—that he then applied to *Jackson* to advance the money for him, offering him a mortgage on part of his said property, for securing that sum and other money which he then owed to *Jackson*—and that *Jackson*, on the faith of that arrangement, paid *Jones* & Co., who had become very urgent, the money due to them by *Royle* before the execution of the mortgage; and they had accordingly debited *Jackson*'s account, and credited *Royle*'s with the amount.

On an account being afterwards taken between them, *Brundrett* was found to be indebted to *Jackson*, on the whole balance, in 1,943*l.* 6*s.* 6*d.* *Brundrett* was soon after taken ill, and died; never having executed the mortgage. *Jackson* also died in a short time afterwards.

The bill prayed an account of what was due to the plaintiff's testator, and of the assets of the defendant's testator; and that, under and by virtue of the said agreement for a mortgage, the plaintiffs might be considered as specialty creditors of the testator *Brundrett*; and that the trustees and devisees of his real property might be decreed specifically to perform the said agreement; and that, in case the personal estate and the mortgage should be insufficient to satisfy or secure the amount of the plaintiffs demand, the remainder of the testator's (*Brundrett's*) real estate, might be sold and disposed of for that purpose;—and that *Jones* & Co. the bankers, might be compelled

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pelled to assign the bond, and the plaintiffs to be at liberty to use their names, for the purpose of proceeding thereon.

The defendants, who were immediately interested, (the devisees,) denied the amount of the debt, though they admitted it to a certain extent; and they denied that the account had ever been settled, and that the testator *Brundrett* had entered into any such agreement as was stated to have been entered into for a mortgage; and that the bond had been paid by *Jackson* on the behalf of *Royle*, who was his son-in-law, and not on account of *Brundrett*.

Dauncey and *Roots*, for the plaintiffs, submitted, that the question would be, whether they were entitled to any, and what account. They contended, that in all events the bond had been proved, and the payment by *Jackson*, on the account of *Brundrett*; and that enough had been shown to prove that a mortgage by *Brundrett* had been in contemplation, which he had been prevented from carrying into effect by the act of God. They relied on its having been admitted that some debt was due from *Brundrett* to *Jackson*, and that an account had been delivered; so that they were entitled to an assignment of the bond, according to the prayer of the bill.

RICHARDS, *Chief Baron*.—I am afraid I must put you to make your election; for that part of the prayer which seeks a specific performance of the agreement

agreement for a mortgage, does not consist with that which asks for an assignment of the bond and sale of the testator's estate in satisfaction of it.—If the mortgage is insisted on for the whole of the debt, the bond must be abandoned; for if a mortgage should be decreed, it would give you the whole of the estate.

The plaintiffs then elected, [His Lordship having intimated some doubt as to the probability of such a case being made out as would entitle the plaintiffs to a specific performance of the alleged agreement for a mortgage,] to pray an assignment of the bond.

Martin, *Agar*, *Wilson*, *Duckworth*, and *Symons*, for the defendants, admitting the principle, that a party paying the specialty debt of another became entitled to the same security, contended, that the evidence fell short, in the present case, of proving that the testator, *Jackson*, had taken up the bond as the debt of *Brundrett*; although, perhaps, the dealings and debts between the parties might afford ground for going before the Deputy Remembrancer.

RICHARDS, *Chief Baron*.—It certainly strikes me that some debt has been proved; and the question as to whether that debt was by specialty or simple contract, is one which will materially affect the interest of the other creditors. It will be the most convenient course, therefore, that all the

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parties should go before the Deputy Remembrancer, to whom it may be referred, to inquire as to what part of the plaintiffs demand is founded on specialty; all the other creditors will then have an opportunity of coming in.

It is clear that *Jackson* has paid the debt due to *Jones* & Co. on the bond; but then *Brundrett* was only a co-obligor with *Royle*; and it does not exactly appear what agreement was made with *Brundrett* before the money was paid by *Jackson*. As to the account which is said to have been delivered, the settlement of that is at least not acknowledged.

It may be as well to observe here, that the assignment of the bond to the plaintiffs by *Jones* & Co. would be of no use; but *Jones* & Co. might be required to permit their names to be used in putting it in suit, in which case the bill would be dismissed as against them, with their costs of suit.

[The counsel for the heir at law having applied for a dismissal of the bill against him,

The Lord Chief Baron observed, that it was not the practice, in Equity, to dismiss such bills against a heir at law, whom it was always considered proper to keep in Court, even though he has admitted the will, for many purposes of arrangement which could not be anticipated; besides its being generally expected that a heir shall be a party in any

any conveyance which might be directed, although that may be mere matter of form, and not necessary.]

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It was accordingly decreed,

That it should be referred to the Deputy Remembrancer to take the usual account; and to inquire whether *Jackson* satisfied the bond in aid and on behalf of *Brundrett* and *Royle*; the defendants, *Jones* & Co., consenting that their names might be used in proceedings on the bond, if the Court should so direct, and in such manner, &c.

Costs, and further directions reserved.

WILLIAMS and another *v.* The Right honourable W. ODELL.

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Saturday, 21st June.

The Court cannot order a solicitor's bill of costs, for business done wholly in the House of Lords, in the prosecution of an appeal, to be referred for taxation; because their officer has no means whereby he may be enabled to tax such a bill.

CLARKE now showed cause against a rule obtained by *Puller*, for referring the plaintiffs bill of costs, for business done by them in parliament, as solicitors for the defendant, who (was a trustee

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for infants,) to the deputy clerk of the Pleas, or some other competent person, to be taxed; an action having been brought in this Court to recover the balance claimed to be due, and a summons had been taken out for the same purpose, but without obtaining the object; and on the motion being made, the Court expressed themselves much disposed to assist the defendant, to prevent the necessity of going into the several items at *nisi prius*, on the *quantum meruit* count.

The ground on which the application was principally opposed was, that as the bill of costs was wholly made up of business done in the House of Lords, in the prosecution of an appeal from the Court of Chancery, in *Ireland*, it was not a matter capable of being so referred, as there was no means by which it could be taxed; and that there was no instance of any such reference in practice, where there was not a single charge for business done in the Court to which the application was made.

Puller, on the other hand, referred to the case of *ex parte Williams (a)*, where the Court of King's Bench (*Kenyon*, Lord C. J.) after having doubted whether they could do so *(b)*, ordered a solicitor's bill of costs to be referred for taxation, although all the business had been done at the quarter sessions.—That case, he submitted, relieved him from any difficulty which might have been placed in his way by the statute * having

(a) 4 T. R. 496. (b) Ib. 124.
(*) 2 Geo. 2. ch. 23.

directed

directed the application to be made to the Court wherein the greatest part of the business contained in such bill shall have been transacted. As to the objection of the officer of the Court having no means of taxing such a bill of costs as the present, he cited the case of *Lloyd* v. *Maund (c)*, where a bill was referred to be taxed, which was for business done in a criminal prosecution, in the Court of great sessions at *Carmarthen*, where this same difficulty occurred, but the Court said, that if the officer were at a loss he might call in assistance. And he submitted, that as the act of parliament was remedial, and as it was a matter on which it was impossible that a jury should be able to decide, the Court might therefore order the reference as moved.

But the Court held, that—as there was no course in practice for taxation of bills in the House of Lords, (whereas at the quarter sessions, and in the great sessions of *Wales*, there was an appointed officer, whose business it was so to control and regulate the charges for business done,) there was no criterion by which their officer could be enabled to tax the present bill of costs, or any means to which he could resort for assistance;—they had not the power to grant the order for taxation, and therefore they

Discharged the Rule.

(c) 1 Tidd's Pr. 321, (8th Ed.)

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Monday, 23d June.

DICKENSON *v.* HARRISON. (Demurrer.)

Declaration in debt for 800 *l.* on a covenant (in a mortgage-deed for securing payment on a future day certain, of that sum and interest) that the defendant would pay the said sum of 800 *l.* *with interest* on, &c. with breach that he did not, nor would pay the said sum of 800 *l.* on, &c. held good on special demurrer; although there was no averment that the interest had been satisfied, or that the plaintiff abandoned his claim thereto.

A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for, independently of the other.

Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, *semble*, it may be sued for in debt.

THE plaintiff declared in debt against the defendant, on a mortgage for securing the sum of 800 *l.* to be paid on a future day, *with interest.*

To that declaration the defendant demurred; for that an action of debt is not by law maintainable for part of an entire duty created by one and the same covenant or contract; nor can part of such duty be declared for in such action as debt, and part damages, where the covenant is express to pay the principal sum with interest; and also, for that an action of debt is not by law maintainable for interest accruing from day to day; and that the said declaration does not show any right in the said plaintiff to recover the said sum of 800 *l.* thereby demanded.

Lawes, E. for the demurrer, contended that the declaration was bad, for want of an averment that the interest up to the day of default had been paid; for that a declaration in debt for part of a duty, without showing that the residue had been satisfied, could not be supported; and he cited *Mounson* v. *Redshaw* (*a*). This demand, he submitted, was for

(*a*) 1 Saund. 201.

a sum

a sum of money due upon mortgage, and therefore the interest up to the day was recoverable in debt, as part of the contract, and therefore ought to have been included, or stated to have been satisfied. On that ground he distinguished this case from that of *Seaman* v. *Dee (b)*; for the debt, in that case, became due on the making of the deed, and there the interest, held not to be recoverable in debt, must have been as to such as should have become due after the day; and in *Harries* v. *Jamieson (c)*, where the authority of that case was generally doubted by Lord *Kenyon*, and therefore much shaken, it was held, that debt would lie for the interest of money. In *Lapiere* v. Gen. *St. Albans (d)*, it was held, that on a single bill for a sum certain, the interest ought to be taxed; but where the interest is not in damages, but is stated and fixed at a certain rate, debt will lie. *Williams* v. *Fowler (e)*.

The main ground of this demurrer (he submitted) was, that in the present case the interest *up to* the day of bringing the action was recoverable as part of the debt, which is entire, and cannot be kept separate; and the declaration, therefore, was radically bad, unless the interest were shown to have been paid. So Com. Digest, Tit. Pleader, 84. (C. 84.) and *Holt* v. *Sambach (f)*. To the same point he cited *Welbie* v. *Phillips (g)*, where it was held on demurrer that a declaration for less than

(b) 1 Ventr. 198.
(c) 5 T. R. 553.
(d) 2 Ld. Raym, 773.
(e) 1 Str. 410.
(f) Cro. Car. 104.
(g) 2 Ventr. 129.

the

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the plaintiff was entitled to, under one entire and several demand, was bad. So also in *Hunt* v. *Braines* (*h*); *Pemberton* v. *Shelton* (*i*); and *Bailey* v. *Offord* (*k*).

Littledale, in support of the declaration, insisted that the plaintiff was entitled to abandon any claim of interest which he might have, and proceed for the principal alone. Then the question on the record would be, whether the plaintiff were entitled to recover the principal. He submitted, that this was precisely the case put by Lord *Hale*, in *Seaman* v. *Dee*, of a party covenanting by deed to pay principal and interest, where it was held that the interest was not to be included with the principal in an action for debt. The reason being, that it shall be turned into damages, which the jury is to measure. Whatever doubt was thrown on that case by the *dictum* of Lord *Kenyon*, in *Harries* v. *Jamieson*, it was not overruled; nor was it necessary on that decision that it should be; for the sole result of that case is, that if a plaintiff choose to proceed for interest separately, he may do so.—In the case cited from 2 *Cro. Car.* and in all the others, the plaintiff declared for less than was manifestly due to him on his own shewing, and in those of course the declaration would be bad, unless it was shown that the rest had been satisfied. There are cases which hold that a plaintiff must wait till the last day, but here the last day was past. A party may either sue for

(*h*) 4 Mod. 402. (*i*) Cro. Jac. 498.
(*k*) Cro. Car. 137.

a principal

a principal sum of money, or for the interest due on a given day; but if he sue for the latter, he must declare for the whole, or show the rest satisfied. In the case of *Welbie* v. *Phillips*, the plaintiff sued for a whole year's rent, and declared for only half a year. The distinction is, that in this case the contract for re-payment of the principal sum is independent of the contract for the payment of interest. In cases of rent, if one proceed for a subsequent quarter, it shall be intended that the previous quarters have been satisfied; but the demand of interest is quite different, because it is accruing from day to day.

Lawes, in reply.—There can be no intendment on a special demurrer. Though interest be a claim accruing from day to day, it may still be sued for integrally up to any given time, for *id certum est quod certum reddi potest.* The authority of Lord *Hale*, in *Seaman* v. *Dee*, it has not been necessary to impugn, because that case is distinguishable. The jury cannot assess interest up to the day in a case of this sort, by way of damages *detentione debiti*. The argument, that the plaintiff may abandon his claim of interest, is answered by the fact of his not having so declared, and that it is which forms the objection to the declaration raised by this demurrer; for if that claim had been explicitly abandoned, there would have been no ground for this discussion.

GRAHAM, *Baron*.—It would have been more satisfactory to me to have taken time on so nice and important a question as the present; but as my brothers

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brothers entertain no doubt, I shall give my opinion at once.—[His Lordship then stated the objection raised by the demurrer.]—Now certainly common sense suggests, that there would be much hardship in allowing that objection to prevail, by holding that a party cannot wave his claim for interest, and sue his debtor for the principal sum due only; and I feel myself grounded in deciding that he may, by the authority of my Lord *Hale* in the case of *Seaman* v. *Dee*; and I do not consider that his opinion has been overturned by the subsequent case of *Harries* v. *Jamieson*. I think the distinction taken by Lord *Hale* is sound and just. Indeed the case of *Harries* v. *Jamieson* differs from it only in holding, that, notwithstanding interest in general is properly for the consideration of a jury, because sounding in damages, yet that a party may bring debt for it wherever the amount has been liquidated.

When the sum sued for is less than what appears to be due, no doubt it should be shown that the rest has been paid; but in a case where the claim of interest is created by deed, the principal debt is one thing, and the interest accruing, another. The latter is in the nature of damages only, and therefore the plaintiff may, if he pleases, wave that claim.

WOOD, *Baron*.—Notwithstanding a great many cases have been cited in support of this demurrer, I think them all distinguishable from the present, and that the objection which has been raised by it is not on any ground sustainable.

In

In the deed, as set out in the declaration, there is the usual covenant that the defendant would pay the plaintiff the sum of 800 *l.*, and also something more at the same time, which was the interest, and that is equivalent to a covenant to pay two distinct and independent sums of money. The breach is, that nevertheless the said defendant did not, nor would, pay the said sum of 800 *l.* on the day and time mentioned and appointed for payment of the same. In all probability the interest has been paid down to the time: afterwards there must have accrued some further interest, but that can be recoverable only in the way of damages.

The question on this demurrer amounts in truth to this—whether, when two distinct sums are due to the same person, on the same day, under the same instrument, he may not sue for either, at his election; or whether he is therefore necessarily compelled to proceed for both in the same action?

I am of opinion that he might sue for either; and in the present case, I think the sums are completely distinct and unconnected, notwithstanding they become due by the same instrument, and that they may therefore be separated by a plaintiff who sues to recover them, so as to be made the subject of separate actions.

The decisions that have been cited were all on cases where the debt was one entire demand; and I agree that where that is so, you must aver in your declaration, if you proceed for a part of the debt, that the rest has been satisfied; as if in this declaration

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ration in debt for 800 *l.* after having set out the covenant, the plaintiff should have gone on to state whereby an action hath accrued to him, to demand and have of and from the said defendant 700 *l.*; that would have been an obvious and palpable inconsistency on the face of the declaration, which would undoubtedly have been, therefore, bad; but that is not so here, or any thing like it; he demands strictly the integral sum of 800 *l.*; and that is a good demand; for the other sum is distinct and separable, and need not be demanded by the declaration, or shown to have been satisfied.

I am therefore of opinion, that this declaration is properly drawn. It certainly might have been made more formal, but that was by no means necessary; therefore there must be judgment for the plaintiff.

GARROW, *Baron*, concurred.—I will say one word only, varying my opinion from that of my brother *Wood*, who has said that these two sums are separable—I say that they are in their nature separate, and never were one integral sum, and the reason, good sense, and justice of the case, are all against the objection.

Per. Cur.

Judgment for the plaintiff.

SMITH

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Wednesday, 25th June.

SMITH *v.* CARRUTHERS and another.

Service of notice of the allowance of a writ of error, (bail in error not having been put in,) on the tipstaff having brought the defendant in custody into Court, (where the notice of the allowance of the writ was tendered to him,) for the purpose of his being charged in execution, is not sufficient to give it the effect of a *supersedeas*, so as that the defendant may apply for his discharge, after having been charged in execution.

It should also be served on the plaintiff's attorney.

Had bail in error been perfected, it might have been ground for a special application to the Court, to discharge the defendant out of custody.

CAUSE was now shown, by *Reader*, against a rule obtained by *Richards*, that an order for charging the defendant in execution might be discharged, and the defendant freed therefrom; a writ of error having been allowed, and notice thereof previously given to the tipstaff who brought the defendant into Court.

The rule had been moved for on an affidavit, stating, that a writ of error in this cause, tested the 14th *June*, had been sealed and allowed on the 16th; and that after such allowance, and on the same day, a notice in writing of that allowance was *tendered to the tipstaff in Westminster Hall, in whose custody the defendant then was*; but that the defendant was, notwithstanding, afterwards on the same day charged in execution.

The affidavits in answer stated, that final judgment had been obtained on the 5th of *May* last; that a writ of *habeas corpus* was issued on the 11th of *June*, and lodged in the *Fleet Prison*, for the purpose of bringing the defendants up to be charged in execution on the 16th; and that no bail in error had been perfected.

It

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It was contended, that the notice of the allowance of a writ of error, served at such a time and under such circumstances, did not make it an effectual *supersedeas*.

In support of the rule it was submitted, that the writ of error having been allowed, and the time for putting in bail not having expired, it suspended the execution. In *Sampson* v. *Brown (a)*, it was held, that the allowance of a writ of error was in itself a *supersedeas*, although bail in error had not been put in. So also in *Meagher* v. *Vandyck (b)*, a writ of error was held to be a *supersedeas* from the time of allowance.

WOOD, *Baron*.—It is not only necessary that the writ should be allowed, but notice of the allowance should be served on the plaintiff's attorney.

[The Master being referred to, certified that that was the practice of this Court.]

GRAHAM, *Baron*.—If bail in error had been perfected, it might have let the defendant in, on a special application to the Court to be discharged from the execution.

Rule discharged.

(a) 2 East. 439 *. (b) 2 B. & P. 370

* In that case Lord *Ellenborough*, adverting to *Perry* v. *Campbell*, (3 T. R. 390,) said, that Lord *Kenyon* had there held, that the allowance *and service* of the writ of error was a *supersedeas*.

BUTTS

BUTTS and others, Assignees, &c. *v.* BILKE and HAVELOCK.

1817.
Wednesday 25th June.

The Court will not interfere to stay execution on a judgment recovered in trover against a defendant, till the plaintiff shall do any act, however reasonable, to make the defendant a title to the subject matter of the action. They have no jurisdiction to do so.

A rule for that purpose discharged, *with costs.*

DAUNCEY now showed cause against a rule which had been obtained by *Comyn* on a former day, that on the defendant *Havelock*'s bringing into Court the damages recovered in this action, the plaintiffs should be restrained from issuing execution in this cause, until they should have executed a bill of sale of the ship *Satyr*, and perfected the transfer thereof to the defendant *Havelock*, and that all further proceedings should, in the mean time, be stayed.

The plaintiffs had recovered a verdict in 3,000*l.* damages against the defendants*, in an action of trover, for a ship seized by *Bilke*, the sheriff of *Surrey*, under a *fieri facias*, at the suit of *Havelock*.

The rule was obtained on the suggestion of the hardship which would fall on the defendant if the Court should refuse to interfere, for if he were to be called on to pay the amount of the damages recovered, before a sufficient title should be made to him by the execution of a bill of sale, and a regular

* The particular facts of this case are given at length in the case of *Butts* v. *Bilke*, *ante*, p. 241.

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transfer perfected, and the register given over to him by the plaintiffs, he would be the whole out of pocket, without being in a situation either to sell the ship, if it were necessary, to enable him to satisfy the judgment, or to exercise any act of ownership over her, to which he was as much entitled by the verdict as the plaintiffs were to their damages.

It was now objected to the motion made on the part of *Havelock*, that the object of it was merely to delay the plaintiffs; and it was stated that the plaintiffs had it not in their power to do what was required of them, but that they were willing to execute a bill of sale.

Bolland and *Comyn*, in support of the rule, submitted that it would be great injustice to the defendant, to compel him to pay the value of the ship, without having a title made to him by the parties who were to receive the money;—that this was an application to have the benefit of the equitable interference of the Court, in exercising a power inherent in them of controlling the proceedings in a cause before them.

RICHARDS, *Chief Baron*. I fear the Court cannot assist the defendant in the present instance. We cannot tell a plaintiff that he shall not have the fruits of his judgment till he has performed any preceding condition which we might annex to it; though in equity, it is not unusual to order parties to comply with certain terms, as to execute conveyances.

All

All that is wanted, is, in the nature of a further assurance, without warranty, and the plaintiffs, it appears, are willing to execute a bill of sale, but will not do any thing not expressly specified. It would be advisable, perhaps, that this should be settled by an arbitrator; but if the plaintiffs will not consent to do what is required of them, we have no power to compel them.

GRAHAM, *Baron*, of the same opinion. We may regret that we cannot interfere in the way required, but we have no power to order the execution to be stayed, if the plaintiffs refuse to consent.

WOOD, *Baron*, concurred. Every thing ought to be done in the plaintiff's power to make good the title of the defendant; but we cannot engraft terms on a judgment recovered by plaintiff, operating to stay his execution.

The plaintiff having obtained this verdict for damages, the property in the ship became vested in the defendants; and therefore they may make a title. As to getting the register transferred, there can be no difficulty about that, and the sheriff may do it without the assignees. I never heard of such an application before. We cannot interfere.

GARROW, *Baron*, of the same opinion. We cannot violate the rules of law to effect any arrangement, however equitable.

Rule discharged, with costs.

1817.

Wednesday, 25th June.

A purchaser cannot declare off a contract, on the ground of the vendor not having perfected the title within a reasonable time, where the former who was in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negociate with the latter down to a recent period, and then on a sudden, (a fortnight after the last act of negociation,) tells him, that he abandons the contract.

An injunction will be granted to stay an action commenced at law by the purchaser, to recover back whatever of the purchase-money has been previously paid under such circumstances, *on motion*, almost as of course; and if the case were made out, it would be sufficient on the hearing.

Time is not of the essence of such a contract. Had the purchaser declared off, on delivery of the abstract, he might perhaps have got rid of it, and given up the possession.

WARDE *v.* JEFFERY.

THIS bill was filed for a specific performance of a contract, dated the 2d *January* 1813, for the sale of an estate in certain glebe land and great tithes, and to compel the defendant to pay the remainder of the purchase money, (3,500*l.*); and for restraining him from proceeding further in an action commenced by him, to recover back such part of the purchase-money as had been paid by the defendant to the plaintiff on account.

The defendant, in his answer, admitted the agreement, and that he had entered into possession and receipt of the said tithes and premises in the same month, and received the rents at the following *Michaelmas*, but insisted, that having been advised, on the abstract being delivered in the month of *October* 1815, that the title was defective, he afterwards (on the 22d *January* 1815), gave notice of his relinquishing the contract; of which relinquishment he also gave notice to several persons with whom he had made sub-contracts, for the sale of parts of the said glebe and tithes, previous to his

commencing

commencing the action for the recovery of the purchase-money which had been so advanced;—and that he could not afterwards be considered as in possession.

The answer also stated, that after the defendant had paid the two first instalments of 2,000*l.* and 500*l.* and interest, down to the first of *January* 1816, he then first discovered that the right to tithes did not extend to all the lands mentioned in the agreement; and therefore he applied to the plaintiff for a terrier or particular of the said tithes, which was not furnished;—and that being pressed for further advances, he wrote a letter to the plaintiff, *on the 7th January* 1817, stating that when he should have received the terrier, before mentioned, and have been allowed for the quantity of land which appeared to him to be deficient, he would pay the further money required of him, into any banking-house in *London*, but that such terrier had never been sent to him.

The defendant admitted the action was brought in last *Easter* Term, and submitted, that as the plaintiff had not made out a good title in a reasonable time, whereby he had sustained great damage, loss and trouble, he was therefore not bound by his said contract, or to accept such title as the plaintiff could make to the said lands, tithes and premises, which he had been advised and believed was not good or marketable. On these facts,

Trower and *Lovat* now moved for an injunction, as to the defendant's action at law, which

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Martin and *Spranger* opposed, contending, that contracts were not to be thus kept open to an indefinite period; and that there must be some time limited within which a vendor ought to be compellable to perfect his title, or a purchaser should be at liberty to abandon it. And they urged the fact of possession having been given before the delivery of the abstract, to show, that at the time of the defendant's taking possession, he was not aware of the objection to the title.

Trower and *Lovat, contrà*, contended, that time was not of the essence of such a contract, and therefore the plaintiff was not bound to complete his title within the precise period. They insisted that it was the defendant himself who had delayed the performance of the contract, for the plaintiff had been always desirous of so doing, while the defendant was throwing objections in his way; and the purchase-money being a large sum, it must be a great object to a vendor who has parted with the possession of his estate, to receive it in this or any case. They submitted, therefore, that the Court would not decide so important a question on an interlocutory motion.

RICHARDS, *Chief Baron*. The Court are of opinion, that the injunction ought to go. I will state the reasons which govern me, and which may, in the end, be useful to both parties. This case does not involve the question (which must, whenever it arises in any case, be the consequence of very special circumstances) of time being of the essence

essence of a contract. In almost all the cases where the time is fixed, as if it were that the estate should be conveyed within three months, the time is not even then of the essence of the contract, for most generally it cannot be done. Lord *Thurlow* was strongly of opinion in favour of the rule, that time should not be of the essence of a contract, even where the agreement was for a particular day; and on one occasion *(a)*, where it was put hypothetically in argument, that there might be an express clause inserted for making such a contract void, Lord *Thurlow*'s short answer was,—"Well, Mr. *Mansfield*, what would you get by that?" But the argument raised on the fact of four years having expired in this case, without a title being made, much surprised me when used by a purchaser, who has himself lain by for a considerable time, without taking any steps, or showing any anxiety to get his contract completed. He has been equally guilty of delay, although he complains of the plaintiff. [His Lordship dwelt with particularity on the dates of the different periods of the negociation, and adverted to the fact of the defendant having continued in possession.] Possibly the defendant might have declared off when the abstract was delivered, or in a reasonable time after; but then he must have delivered up possession; but here, from the year 1813 to 1815, letters have been continually passing between the parties, on the subject of the contract; and he accepts further abstracts, and goes on with the negociation down to the 7th *January*

[a] *Gregson* v. *Riddle*, cited in *Seton* v. *Slade*, 7 Ves. 268.

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1817; on that day, admitting, therefore, that he considered himself to be still a purchaser, and yet so soon after that time,—and after that long course of negociation, as the 22d of the same month, he turns round on a sudden, and without previous notice, sends a letter, in which he says he declares off, and that on an objection to the title, which he was aware of from the year 1813. Now, can any case be imagined, where, under such circumstances, the Court would refuse to interfere? Surely this is, therefore, a very clear case, and I think that the purchaser is still bound by the contract. For these reasons, independent of the general rule,—that injunctions ought to be granted on motion where a *prima facie* case, for the interference of the Court, is made out,—I should, in such a case as this, say the defendant was bound, were I now giving judgment on the hearing. The better course however would be, that the parties should agree to a reference in the mean time.

GRAHAM, *Baron.* I am clearly of opinion that the defendant ought not to be permitted to go on with this action. There is no time specified in the contract for its completion. The defendant was put into complete ownership of the property, and has been long in actual possession of the profits; and he enters himself into contracts to sell. The question then is, whether the Court will, in a case of this sort, say that a vendor is bound to complete his title within a certain reasonable time, when the parties themselves have made no such agreement?

But

But here, the defendant, by his letter, admitting himself bound so late as the 7th *January* 1817, requiring further satisfaction as to the title, cannot be allowed, on the 22d, to declare off, on the ground of the vendor's having neglected to perfect his title in a reasonable time. And the hardship of suffering this action to proceed, would be the greater, because the defendant has received considerable sums of money from the rents and profits. Whenever this shall come to a hearing, there must be a decree for the plaintiff. As to the question of the title, that must go before the Master.

WOOD and GARROW, *Barons*, of the same opinion.

Injunction granted, and Title to be referred to the Deputy Remembrancer.

JONES

8 LR Ex. 217

1817.

Wednesday, 25th June.

JONES and others v. DARCH and others.

In an action on a bill of exchange against the acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs, on evidence that the defendants knew, when they accepted it, that the payee was an infant, and that he had, in fact, indorsed the bill before they accepted it; the Court, under those circumstances, (it appearing also that the defendants had been in the practice of raising money on similar bills,) refused to disturb the verdict by granting a new trial, applied for on the ground of the legal objection,—that an infant could not, by his indorsement, give currency to a bill of exchange; but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation.

THIS was an action on a bill of exchange drawn by *Thomas Aspull* on the defendants, (*Darch, Dickenson*, & Co.) and accepted by them, in favour of Messrs. *Wm. Aspull* & Co., and by *Wm. Aspull* indorsed to one *Booth*, and by him to the plaintiffs, who were his bankers.

It appeared in evidence, on the trial before the Lord Chief Baron, at the sittings in this term, that *Thomas Aspull*, the drawer of the bill, had been managing clerk of the defendants at the time when the bill was drawn;—that the defendants afterwards stopped payment: on which occasion it was arranged between them and their creditors, that on the latter receiving 10*s.* in the pound by three instalments, no commission of bankruptcy should be sued out against them; and certain persons, who had become security for the due payment of those instalments, entered also into a bond of indemnity to the defendants (on having their property delivered up to them) against the future claims of any of their creditors.

The defence set up was, that *Wm. Aspull* the

payee,

payee, who was the son of *Thomas Aspull* the drawer, was an infant, and could not therefore indorse a bill. And it was put as a suspicious transaction altogether; because, it was stated, that the bill had been in fact applied to the private purposes of the drawer, who was said to have deceived his employers, and that he had kept it back till after the settlement of the defendant's affairs, and that there was no other person in the firm of *Wm. Aspull* & Co. besides *Wm. Aspull*, nor ever had been. It was also objected, that in point of law the payee, who was of course the first indorser of the bill, being an infant both then and now, was not entitled to indorse, nor could, by his indorsement, give currency to the bill, or render it legally negociable. But the cause being suffered to proceed, it appeared that all these circumstances were known to the acceptors (the defendants), and that the bill had been indorsed before they accepted it, and therefore the jury found a verdict for the plaintiffs.

Jones now moved for a new trial, on the ground of the objection, that the indorser, being an infant, could not give the indorsee a right to sue on it against the defendants; and he cited the case of *Williams* v. *Harrison* (a), where it was ruled, that infancy was a good bar to an action on a bill of exchange, notwithstanding the custom of merchants. In the present case, the infant was the first indorser, and as he could not bind himself, the bill could not be negociated through him; and

(a) Carth. 160.

he

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JONES and others v. DARCH and others.

he distinguished this case from that of *Taylor* v. *Croker (b)* by its having been proved here, that the indorser was not even now of age, so that there could be no subsequent consent implied, or any new promise made.

But the Court refused the rule, saying, that as far as these defendants were concerned, who were proved to have known all the circumstances before they accepted the bill; and as it appeared from the evidence (which the jury believed) to have been their object to get all the money they could by means of such bills; they ought not now to be permitted to avail themselves of the objection, whatever weight it might have had in a case of different circumstances.

Rule refused.

(b) 4 Esp. 187.

EYTON

EYTON *v.* DICKEN.

1817.

Wednesday, 25th June.

WILLIAM Massey having been declared and confirmed the purchaser of lots Nos. 1 and 6, parcel of certain freehold estates sold before the Deputy Remembrancer, under a decree of this Court in the above cause, (which was a suit by creditors,) and being dissatisfied with the title set out in the abstract, obtained an order to refer it to the Deputy Remembrancer in the usual manner, who reported that a good title could be made to the premises comprised in those lots.

A purchaser, who is not satisfied with the Deputy Remembrancer's report of the title to premises sold under a decree of the Court, must move for leave to file exceptions thereto.

Shadwell now moved to confirm that report absolutely, when

If he does not do so the motion to confirm may be then made, which is an order absolute in the first instance, because it will be considered that he is satisfied with the title.

Spranger objected, that in point of practice such an order could not be made absolutely in the first instance, but that it ought to be moved for *nisi*, in order to give the purchaser an opportunity of showing exceptions for cause, as was the course in the Court of Chancery; but

But if, when the order is moved for, the purchaser is prepared to show exceptions *instanter*, the Court will allow him to do so.

On reference to the officer, it was reported to be the practice *of this Court* to move for such an

A purchaser is not compellable to accept a title reported good by the Deputy Remembrancer, in a creditor's suit, against an objection, that the close in dispute having a given name, by which it has been long known, is not described by it in the title-deeds, notwithstanding the vendor has been long in possession of the land as part of the estate conveyed to him by the deeds. Such a title is merely *prima facie*.

order

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EYTON v. DICKER.

order absolutely in the first instance; and that, wherever it was intended to except to the Deputy Remembrancer's report of title, the course was for the purchaser to apply to the Court for leave to file the exceptions; and that if he should not do so, the rule was, that he should be taken to be satisfied with the report, and then the motion to confirm it was almost of course, and the order was granted absolutely in the first instance, as now moved.

Spranger then proposed to show exceptions for cause *instanter*, which the Court allowed him to do.

The exception with respect to lot No. 6 was:—that there were two closes of land comprised in that lot; with respect to one of which, called the *Croyle*, no mention whatever was made throughout the abstract, nor had any title whatever been deduced to the said close, notwithstanding it had always been known by that name; whereas all the other lands belonging to the estate were particularly specified in the old deeds mentioned in the abstract, and the title formally set forth, and that the only proof of title made to that close before the Deputy Remembrancer, was by the affidavits of several old persons, who had been employed as labourers on the lands generally,—'that they knew the close called the '*Croyle*,—that it had been known by that name, and 'never by any other, as long as they could remem-'ber,—and that it had been also so long in the pos-'session of the defendant and his ancestors, and had 'been considered part of their estate.' He submitted, therefore,

therefore, that such a proof of title was not sufficient to compel a purchaser to take it, as at best it was only *prima facie*, (for mere possession was not inconsistent with any estate not amounting to a fee,) to which a purchaser has always been held to have a right to object, and to refuse to accept, and therefore he ought not to be concluded by the report.

Shadwell, on the other hand, contended, that proof of such long possession, accompanied with the title-deeds of the estate of which the close in question formed part, was quite enough to justify the report of validity of title, as it would have been to warrant a jury in finding in the affirmative on an issue, whether *Dicken* was seised of the piece of ground in fee. He submitted that it was not necessary to describe every piece of land by any particular name which may have been given to it, when there are so many better modes of describing them in use: and he insisted that the exception now taken, founded on such an objection, was not sufficient to invalidate the present report.

RICHARDS, *Chief Baron*.—The Court are of opinion that the Master's report is not right. The evidence on which the report proceeds is merely that of long possession. Then this close is not mentioned in the abstract by name, and it is proved to have gone for a great length of time by a particular name, and the other lands are so described. It is therefore too much to call on the Court to presume, at present, that the *Croyle* was not so called

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EYTON v. DICKEN.

called in 1777, when the conveyance of this estate to the defendant's ancestor was made. The Court cannot compel a purchaser to take a *prima facie* title founded on such grounds.

GRAHAM, *Baron.*—The objection may be, perhaps, somewhat captious; but it is one against which we cannot force an unwilling purchaser to accept a title.

WOOD, and GARROW, *Barons*, concurred.

Exceptions allowed. Title referred back to the Deputy Remembrancer.

——— *v.* ———

Wednesday, 25th June.

The Court will not order a defendant, arrested in trover, to be discharged, on filing common bail, on motion for that purpose, founded on an objection to the form of the affidavit on which the process issued, that it did not negative a tender: although the motion be made on an affidavit, stating, that the value of the subject matter of the action had been, in point of fact, actually tendered to the plaintiff before the writ was sued out.

PARKE moved that the defendant, who had been arrested in this action, might be discharged, on filing common bail.

The nature of the action was *trover*; and he contended, that as the plaintiff had not in his affidavit, on which the process was obtained, negatived a tender, which he submitted he ought to have done, under the 37th *Geo.* III. ch. 91, s. 8. *(a)*;

(a) Tidd, Pr. 150—8, 4th ed.

and

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and more particularly as the value was sworn, by the defendant's affidavit, on which the motion was made, to have been in fact tendered to the plaintiff before the action was brought, the defendant was entitled to be discharged on common bail.

But the Court held, that the statute did not apply to the case of a defendant held to bail in trover, which could only be done under special circumstances, and on an application to the Court.

The motion was therefore

Refused.

GOODE *v.* Sir W. LEWES, Knt.

Wednesday, 25th June.

The Court will not order a party who is in prison, applying for a new trial, on the ground of excessive damages having been given against him, to pay the costs of the former trial before the Plaintiff's Counsel proceed to show cause against the rule.

THE plaintiff (a surveyor) had recovered a verdict, in an action of *assumpsit*, for work and labour on the defendant's account, at the last Spring assizes at *Hereford*,—damages 500*l.*

Taunton, in the last term, obtained a rule to show cause why the verdict should not be set aside, and a new trial granted, on the ground of the jury having given excessive damages.

Dauncey for the plaintiff, before he proceeded to show cause, objected that the defendant was not entitled

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GOODE v. Sir W. LEWES, Knt.

entitled to move to make his rule absolute, until he should deposit with the officer of the Court the costs of the former, which he contended the defendant was bound to do: and he cited the rule from Tidd's Pr. *(a)*,—that where a verdict is set aside, and a new trial granted, on the objection of the damages being excessive, it is always on payment of the costs of the former trial. In this case the defendant being in prison, he submitted that the plaintiff was entitled to the interference of the Court for protection against the probable result of the present rule, which would be the loss to him of the advantage given by the practice of the Court to persons in the plaintiff's situation, who would be at all events entitled to the costs already incurred in the action which had been tried, and had terminated in his favour; and that a defendant ought not to avail himself of the rules of the Court, without complying with the usual terms: But

The Court refused to make the order; observing, that if the object of such an application was admitted to be matter of right, the consequence would be, that a party might be compelled, on many occasions, to submit to an unjust verdict against him to any amount, for no other reason than his inability to pay the costs of a former trial. The application was therefore

Refused.

(a) Page 885, 5th edit.

1817.

25th June.

Motiont in causes to be heard before the Lord Chief Baron, in the exercise of his sole jurisdiction, can only be made before his Lordship when sitting in the inner Court.

SHADWELL rose to make a motion in full Court, in a matter which was pending before the Lord Chief Baron, in the exercise of the sole jurisdiction committed to his Lordship under the recent act of parliament; when the Court intimated (not as matter of regulation, but as the natural course of practice in such cases, to prevent a clashing of jurisdictions), that all motions, in causes to be heard by his Lordship, must be made before him alone, when sitting in the other Court.

WATSON *v.* EDMONDS.

25th June.

If a sheriff's officer, who arrests a defendant, demand and receive from him a larger sum than he is liable to pay as a caption fee, and for the expense of the bail-bond, &c. the Court will, on motion, order it to be referred to the Master to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application.

A charge of 2*l.* 13*s.* 6*d.*, made on a defendant in fee, *wholly* disallowed by the Master, on a reference to him under such circumstances.

OWEN, Sir *Wm.* moved, on a former day, that the sheriff of *Worcestershire* might be ordered to show cause why it should not be referred to the Master to ascertain whether he (the sheriff) was entitled to any and what part of the sum

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of 2*l.* 13*s.* 6*d.* paid to his officer by the defendant; and why he should not refund to the defendant such sum (if any) as the Master should report to have been overpaid to the said officer; and why the sheriff should not pay the costs of this application.

The rule was obtained on an affidavit, stating, that the defendant had been arrested in last Easter Term, when he immediately entered into a bail-bond;—that the officer, after he had executed the bond, demanded the above sum of the defendant, and detained him in custody till he paid it, which he did in order to procure his discharge from the arrest;—and that the defendant and the said sheriff's officer, both lived in the same town.

It was submitted, that the sheriff was not entitled to charge any fee for the arrest of a defendant from the defendant himself, because it was a charge to be made by him on the plaintiff;—and that, whatever he were entitled to charge the defendant with as the expense of the bail-bond, it could not be any thing like the sum which the officer had demanded and received from the defendant, in the present instance. And he directed the consideration of the Court to the case of a defendant going to prison and afterwards perfecting bail, and inquired whether an officer could then keep him in custody till his fees were paid;—or, in the event of the action being defended, whether the Master would allow the *defendant* any

any caption fee in taxing his costs against the plaintiff.

No cause being shown, the Court now made the

Rule absolute *.

* The Master disallowed the whole of the charge.

END OF TRINITY TERM.

Mr. Dew
Lincolns

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

AND

EXCHEQUER CHAMBER.

SITTINGS AFTER TRINITY TERM,

57 GEO. III.

GRAY'S-INN HALL.

The KING *v.* HODDER.—(Extent.)

Ex parte TAUNTON.

1817.

Wednesday, 9th July.

Where a landlord has distrained for rent arrear, and the tenant has replevied the goods, and has sold a part on his own account, by permission of the landlord, if in the mean time the remainder are seized under an extent tested after the distress for a debt due to the Crown, which is satisfied thereout, according to the exigency of the writ, this Court cannot, in the exercise of its equitable jurisdiction, interfere to enlarge the time for the return of the process, that the sheriff may in the interim proceed under it against the defendant's *lands*, for the landlord's indemnity, on the ground, that the defendant *had not, pending the distress, in point of fact, goods and chattels sufficient* to satisfy the Crown's debt, or in any way use the Crown process in favour of the landlord under such circumstances, and principally because on the levy having been made, the writ would be *eo instanti functus officio.*

OWEN, Sir Wm. and *Taunton*, moved for a rule to show cause why the time should not be enlarged for the sheriff of *Somerset* to return two writs of

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extent against the lands of the defendant; and why he should not proceed to take an inquisition upon the seisin of the defendant, of certain lands in the county of *Somerset*; and why the debts due to the Crown from the defendant, or so much thereof as can be had, should not in the first instance be raised out of such lands, and discharged thereby; and why a certain sum of money, already paid to the said sheriff by the defendant, and which was raised by sale of his chattels, which had been distrained for rent by the applicant, should not in the mean time be staid in the sheriff's hands; and why, after applying such part thereof, if any, to the debt of the Crown, as may be necessary, in aid of the levy made out of the aforesaid lands, the residue should not be paid to the applicant.

[RICHARDS, *Chief Baron*, on the motion having been made, observed,—It is a very common application in the Court of Chancery to marshal assets under circumstances, but I do not see how this Court can do so in a case of property seized under an extent.]

The affidavit made in support of the motion stated in substance, that the bailiff of the applicant had, on the 3d of *March* 1817, seized and distrained the cattle, &c. of the defendant, for the sum of 3,001 *l.* 10*s.* 9½*d.* for rent of premises, of which the defendant was tenant to the applicant; that he kept possession thereof till the 8th, on which day, when the same were about to be appraised, &c. the bailiff was served with a summons by virtue of a replevin-

replevin-warrant from the sheriff of *Somerset*, to answer the taking, &c.

'That on the same day the residue of the goods, &c. of the defendant so distrained, as well as the cattle, goods, &c. so replevied, were seized by the said sheriff, under a writ of extent issued against the defendant, tested the 7th day of the same month of *March*, for 302 *l.* 11 *s.* 11 *d.* and were also soon after taken and seized by the said sheriff under another writ of extent, tested the 10th day of *March*, for 127 *l.* 12 *s.* 10½ *d.*, both such sums being due to his Majesty for assessed property and land-taxes from the defendant, who was a collector of taxes.

'That on the 16th, the defendant, his attorney, and one of his sureties, applied to the landlord for his consent to an intended sale of the goods replevied by the defendant on his own account, when they entered into an agreement that the produce of the sale should be paid to the under-sheriff, for the Crown, in discharge of the extent, and the balance to be paid to the landlord; or, that the whole should be paid to a Mr. *White*, to be appropriated to either debt, as he should think proper; and that, upon taking an account on that occasion, the defendant admitted 1,315 *l.* 11 *s.* to be at that time due to the landlord for rent; that the landlord agreed to accept a smaller sum of money, in consideration of being paid it immediately out of the produce of the sale of the replevied goods; and that the defendant's attorney represented, that the defendant's sureties had deposited with him 300 *l.*; and that he would

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Ex parte TAUNTON, in The KING v. HODDER.

himself advance the remainder of the amount agreed on to be paid to the landlord: That at a subsequent meeting (23d *March*) the following agreement (which was not to prejudice the former agreement), was entered into, and put into writing, viz. that on payment of 1,050 *l.* to the applicant (in manner therein mentioned), the defendant should receive a receipt in full of all demands; that a valuation of a third of the hay, and all the green crops on the farm, was to be made, and deducted from that sum; and concluding with a provision, that in case the agreement should not be performed on the defendant's part within a month, the distress and sale should proceed for the benefit of the landlord. The affidavit then went on to state, that on the faith of such agreement the defendant was allowed to take away, for his own use, his cattle, &c. so distrained; that 300 *l.* or 400 *l.* of the said sum was afterwards paid, but that the residue was not; and that the defendant's attorney had refused to pay the remainder out of the sums so deposited in his hands by the sureties, or to make up the deficiency himself as agreed on as aforesaid.

'That the defendant was seised of lands in the said county of *Somerset*, subject to certain encumbrances, but which would, if sold, produce more than sufficient to pay off the extents, and discharge such encumbrances, without resorting to any of the goods, &c. of the defendant.

'That no inquisition had been taken on the writs of extent; and that they had not yet been returned;

turned; and that the stock, &c. replevied, was sold under the direction of the defendant's attorney, and not by the sheriff, or adversely to the defendant; and that the defendant's attorney received the produce.

'That the solicitors for the affairs of taxes, on application being made to them on behalf of the landlord, under the circumstances, to resort to the defendant's lands, had consented to give the applicant all the assistance in their power, and applied to the sheriff for that purpose, who refused to act further in the matter.

'That the stock, &c. so sold, had produced 509*l.* 19*s.* over and above certain part thereof, which had been bought in by, and restored to, the defendant; and that the whole of the goods distrained would not have been of sufficient value to satisfy the rent due.'

These facts so detailed in the affidavit, it was submitted, afforded good ground for resorting to this application for the equitable interference of the Court, so to marshal the assets of the Crown's debtor, as that a landlord who was a *bonâ fide* creditor of such debtor for rent due, and who had actually distrained for the amount before the *teste* of the extent, might not have his pledge taken out of his hands, to the exoneration of the lands of the debtor, against which the Crown might proceed availably, although the landlord could not; and that if the Court had no power to interfere in a case of this

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sort, every tenant distrained on, might by collusion release his goods and chattels from the effect of such a proceeding, through the medium of an extent, and thereby defraud his landlord. In this instance, the Crown's debt will have been levied on the property of a third person, (the defendant's landlord,) and put into his possession, by a mode of proceeding favoured by law, and always protected by the Courts.

It was contended also, that in this case the defendant had by his conduct waived the benefit of the general rule, that the sale of the Crown debtor's lands shall be postponed to that of his goods and chattels, where he has sufficient to satisfy the Crown's debt; whereas the landlord had not relinquished, by any act of his, the pledge which the law gives him in property distrained; and the defendant had, in fact, no interest in these goods at the time of their seizure under the extent, which could bring the Crown within the rule observed by Court, as to the sale of goods, &c. in the first instance, or preclude the Crown's right to proceed against the lands as given by the 25th Geo. III. ch. 35. s. 1 *. Nor in this case would it be adverse to

* By that statute the Court of Exchequer is authorized, on the application of the Attorney-General, in a summary way, by motion, to order that the right, title, and estate of any debtor to his Majesty, in any lands which have been, or hereafter shall be, extended under or by virtue of any such writ of extent, or *dum clausit extremum* as aforesaid, or so much

to the provision of *Magna Charta*, that the lands should be taken, for the same reason, because by operation of the distress the defendant had not goods and chattels sufficient to pay the Crown's debt, nor was he himself at the time of the seizure prepared to do so thereout. The words of the charter are,—"*Non seisiemus terram aliquam, "vel redditum pro debito aliquo quam diu catalla "debitoris præsentia sufficiunt ad debitum red-"dendum et ipse debit' paratus sit inde satis-"facere (a).*"

They distinguished this case from that of *The King* v. *De Caux (b)*, as in that case there had been no distress made before the seizure under the extent; nor did it appear then that there was sufficient property, of any sort, to satisfy the Crown's debt and the landlord's arrears of rent; and the application was altogether of a different nature, *et alio intuitu* *. In this case there was no objection made on the part of the Crown.

much thereof as shall be sufficient to satisfy any such debt, shall be sold in such manner as the Court shall direct, (with costs,) and the surplus to be returned to the person who would have been entitled to the lands if no sale had been made.

(a) Co. 2d Inst. 19. (b) *Ante*, Vol. II. p. 17.

* Nor does the more recent decision in the case of *The King*, in aid of *Simpson* v. *Hopper*, *ante*, Vol. III. p. 46, appear to stand in the way of this application, for the reasons given above in showing that it is not contrary to the terms of the great charter.

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They submitted, therefore, that the Court had power to grant the present application; and moved as above.

RICHARDS, *Chief Baron.*—This is a case which must have occurred often, in effect, though it may not till now have been brought before the Court, perhaps, in this precise shape. The extent, it appears, came in after the distress, but was satisfied first, in point of fact, and out of the very goods which the landlord had distrained. Then the landlord says the Crown has deprived him of the benefit of his distress; and that the sheriff ought to have taken the defendant's land, which the landlord cannot proceed against. But a judgment-creditor might say so too, who has also a special property in the debtor's goods, and I do not perceive what equity a landlord has which a judgment-creditor has not; and there is, I believe, no instance of such an application having ever been made before.

The short case is this: The Crown's debt has been satisfied out of the personal effects of the debtor; then the subject-creditor of the Crown's debtor, on the ground already noticed, applies to this Court to interfere, as it is now moved. I really know not on what principle this Court can interfere to such an extent; nor do I know of any power which this Court has to marshal assets in the case of an extent, under such circumstances as these.

But

But another short and insuperable objection arises, from the fact of the Crown's debt having been satisfied, and that being so, how can the Court proceed to effect the desired object? The Crown can have no other process; and nothing can come before the Court again under this extent.

GRAHAM, *Baron*, of the same opinion, and for the same reasons. Nothing can bring this extent again before the Court. The sheriff having seized these goods, even if irregularly, must be answerable to the Crown if called on; and must make good the Crown debt which he has, in point of fact, levied.

The statute of *Henry* VIII. as to extents, goes, certainly, farther than *Magna Charta*, in giving efficacy to the Crown process; but the Court, respecting the fundamental principle of the Great Charter, tempers the exigency of the writ by a negative mode, in ordering the sheriff not to proceed against the land if the debtor's goods and chattels, are sufficient to satisfy the Crown's debt *; and there is a clause in every extent, restraining the sale till after further order; but when the Crown's debt is once satisfied, the Court can not look to the interests of other creditors.

WOOD, *Baron*.—It is quite impossible for us to grant the relief prayed by this motion. Suppose the sheriff had been called on to make his return:

* See also his Lordship's judgment in *Rex* in aid, &c. v. *Hopper*, *ante*, Vol. III. p. 47.

it

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it must have been, that he had levied the Crown's debt out of the defendant's goods and chattels. Could we in that case order a new writ to levy the landlord's rent out of the defendant's land? The Crown can not levy its debt a second time. It is quite impossible that we can interfere in the way that has been suggested, if it were only in point of form.

GARROW, *Baron*, concurred.

Motion refused.

MEADE v. NORBURY.

Thursday, 10th July.

The Court will not restrain the Deputy Remembrancer from proceeding in the taxation of costs, on the ground that a petition of appeal has been presented to the House of Lords, against part of a decree, and is still depending.

12 Price 411

MARTIN moved, that the Deputy Remembrancer might be restrained from proceeding further in the taxation of the costs in this cause.

He stated, that the defendant had presented a petition of appeal to the House of Lords, against the decree made by this Court on the 20th *May* 1816 *, so far as it directed an account to be taken of the tithes of certain lands in the defendant's occupation, called the *Lower Friars Lands*; and that, notwith-

* Vide *ante*, Vol. II. page 338.

But they will order the payment of the taxed costs to be suspended till after the decision of the appeal.

standing

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standing such appeal was still depending and unheard, the Deputy Remembrancer was proceeding in the taxation of the plaintiff's costs, which, he submitted, ought to be suspended till the decision of the appeal.

The Court refused to make the order prayed; because, they said, they could not interfere to stay proceedings which were going on in regular course, though they would stop the payment of the money, which was the only thing they could do; and they accordingly ordered that the Deputy Remembrancer should proceed in such taxation, but that the payment of the costs should be suspended till after the appeal should have been decided, and the further order of the Court.

The KING v. BICKLEY.

11th July.

A defendant in an extent having moved to quash it, on facts stated by affidavits, which are satisfactorily answered, whereon a *venditioni exponas*, issues, will not afterwards be permitted to enter a claim and traverse the inquisition.

A RULE had been heretofore obtained by *Copley*, Serjeant, calling on the Attorney-General to show cause why this extent should not be quashed, and the proceedings in the mean time stayed, founded on certain facts stated in affidavits made by the defendant and others. Those affidavits were answered or denied by others, made on the part of the prosecutors of the extent, and the Court discharged the rule with costs.

Gaselee

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The KING v. BICKLEY.

Gaselee now applied for leave to enter a claim, and traverse the extent.

To that it was objected that it was contrary to the practice; that there had been rules to claim and plead, and that a *venditioni exponas* had issued; and that it would operate to delay the prosecutors, which was stated to be in effect the sole object of the application.

The Court held that such an application could not be granted after the defendant had elected to take the course of moving to set aside the proceedings, on affidavits which had, in effect, brought his merits before the Court, and were satisfactorily answered.

Therefore they

Refused the application.

MILWARD

MILWARD and another *v.* OLDFIELD.

1817.

9th July.

3 Gk 34

WINGFIELD moved, that the plaintiffs might be at liberty to withdraw their replication in this cause, and amend their original bill.

The Court will not allow a plaintiff to amend his bill where he has been dilatory without reason, in his former proceedings.

And, refusing such an application, they will do so with costs.

The amendment proposed, was, that another person might be made a co-plaintiff in the suit, and that certain other premises, (not included in the original bill,) being in the defendant's possession, might be introduced into the amended bill.

Rose opposed it, on the ground of the motion being in the delay of the defendant, there having been already great remissness in proceeding on the part of the plaintiff.

The bill had been filed in Easter Term, 1815; —the defendant filed his answer 16th *November* following;—replication, Easter Term, 1816. In Michaelmas Term, the defendant moved to dismiss the bill, when the plaintiff entered into a peremptory undertaking. A *subpœna* to hear judgment having been served, the plaintiff obtained orders to enlarge publication till Easter Term 1817.

In such a case, it was submitted, that the application should not be encouraged.

On

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MILWARD and another v. OLDFIELD.

On the other hand, it was pressed, that the amendment now sought to be allowed, not being on the common grounds, but for the purpose in fact of avoiding multiplicity of suits, by consolidating claims to the same property founded on the same title, and to be litigated between the same parties; the Court would, for that reason, grant the motion.

RICHARDS, *Chief Baron.*—It would be injurious to the course of practice to grant this motion. —[His Lordship recapitulated the proceedings.] —It is now more than a year since the replication was filed, and why was not this application made before? There is no good reason given for not having applied; nor is it stated when the new matter was first discovered. Then, what has been said in support of the motion does not appear to me to forward it; for it is not a mere amendment that it is required to make, it would be a new bill: and if such a proceeding were now indulged, there is no length of time at which it may not be done.

Motion refused, with costs.

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Friday, 11th July.

HOYTE *v.* HAWKINS, Baronet.

An injunction obtained to restrain proceedings at law on a promissory note, on the ground of its having been given to the plaintiff at law under a promise not to sue on it, and an engagement that it should never be asked for or demanded, dissolved on the defendant's putting in an answer, in which he swore that he never had entered into any such engagement, or made any such promise, *to the best of his recollection or belief*; for the Court holds itself bound by the positive allegations on oath in a defendant's answer.

THE defendant had brought an action against the plaintiff, to recover the amount of two promissory notes with interest. The plaintiff filed his bill for a discovery of the circumstances under which the notes were given, and for an injunction to stay the proceedings in the action; which injunction was obtained.

The bill stated, that the plaintiff being, in 1808, concerned for the defendant in confidential affairs, and having occasion for 150*l.*, applied to the defendant for and obtained the amount; for which, it was agreed, that a promissory note should be given, payable on demand, with interest, and which note the plaintiff accordingly gave;—that the defendant, nevertheless, at the same time, expressly stated, that he would never call for, or demand, payment; but that he wished the note to be given as a mere matter of form, or to that effect;—that plaintiff accordingly relied upon the defendant's honour; but was requested, in 1811, by Mr. *Chilcott*, the defendant's steward, to pay three years interest upon the note;—that plaintiff, aware of his liability in law, and apprehending proceedings, tendered the three years interest to Mr. *Chilcott*, who refused to receive for more than one year, but desired a promissory note for the remainder, which the plaintiff gave;—that the defendant afterwards having further occasion for the confidential services of the plaintiff,

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HOYTE v. HAWKINS.

plaintiff, the latter reminded the defendant of his engagement not to demand the 150 *l.* or interest; whereupon the defendant pledged his word and honour that the notes should be destroyed, and promised to write to his steward to that effect. The defendant was then interrogated by the bill, as to the truth of its statements.

The answer of the defendant contained an unqualified denial of his having ever stated to, assured, or gave the plaintiff to understand, that the 150 *l.* and interest would not be called for or demanded. The defendant also stated, by his answer, "That "the plaintiff did not, *to the best of his (the de-* "*fendant's) remembrance and belief*, ever mention "to the defendant that he (the defendant) had "made an engagement not to demand the 150 *l.* "and interest; he, *according to the best of his* "*recollection and belief*, in fact, never having made "any such engagement;"—and, "that he *doth* "*not recollect or believe* that he did pledge his "word and honour that the notes should be de-"stroyed, or promise that he would write to Mr. "*Chilcott.*"

Barber now moved, on the part of the defendant, to make absolute the usual order *nisi* for dissolving the injunction.

Hone, for the plaintiff, shewed cause against the order, on the merits in the answer, contending, that the transaction was of such a nature as to leave no doubt but that the defendant could speak most unequivocally

equivocally to every material fact charged in the bill. If he were competent to deny, in *unqualified* terms, (as he has done,) that he ever engaged not to demand the amount in question, he could, in an equally unqualified manner, have denied the truth of the plaintiff's charge as to what subsequently passed between them: but, when answering that part of the bill, he alters his language, and instead of positively denying that any thing afterwards occurred, states that, *to the best of his remembrance and belief*, the plaintiff never reminded him of the engagement he is charged to have entered into; and he then cuts down, or at least weakens, the express and positive denial contained in the former part of his answer, by stating, that according *to the best of his recollection and belief* he never made the engagement; adding, that he *does not recollect or believe* that he pledged his word and honour to destroy the notes, and write to his steward. And it was submitted, that it could not be credited, that a person charged with having given a solemn pledge at a certain time, in reference to one plain and intelligible fact, and under circumstances distinctly and directly stated, should be unable either to admit or deny the truth of the charge, without having recourse to an ambiguous and circuitous mode of answering, and sheltering himself by a denial, *on recollection and belief*, of what he must necessarily have remembered if it had been so. The defendant ought to put in an answer consistent with itself in all its parts, and state a complete and positive negative of the circumstance on which the plaintiff's right to equitable relief is founded;

 and

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and in such direct terms as that he might be indicted for perjury if untrue, before he can ask for a dissolution of the injunction.

Sed per Cur.—The defendant has sufficiently denied the principal allegation in the bill, and that destroys the plaintiff's equity; for the Court are bound by the defendant's positive allegation on oath. They therefore made the

Order absolute.

ASKAM v. THOMPSON and others. (Exceptions).

11th July.

It is not sufficient ground for an application for an injunction to restrain bankers from proceeding at law, to recover the amount of cheques paid by them, on account of the plaintiff in equity, that the bill (which also prayed a discovery) states that a partnership subsisted between the plaintiff and the deceased principal of the banking firm, in another concern, of which the plaintiff had the conduct and management, and that the cheques were drawn under special circumstances, founded on a mutual understanding between the plaintiff and the deceased, to which the defendants in equity, (the surviving partners in the banking concern), say they were not privy, denying positively, by their answer, that they were in any manner engaged in the concern as partners or otherwise.

Nor is it matter of material exception to the defendants answer, that under such circumstances they do not set forth, as required, the language of the body of the cheques drawn by the plaintiff as such managing partner, for having denied that they were in any way concerned or interested in the business, it would be of no service to the plaintiff, if it were so set forth, as that (if it were true) would avail him on the trial at law.

THE plaintiff applied for an injunction on opening a material exception.

The bill—which was filed for an account between the parties, and for an injunction to restrain the defendants from proceeding in an action commenced by

by them at law, to recover the balance from the plaintiff,—stated (in substance) that *Smith*, a creditor of the defendants who were bankers at *Leeds*, had agreed to furnish them weekly with a stipulated quantity of coals for a given period, in discharge of his debt to them;—that they having acceded to his proposal, applied to the plaintiff to undertake the management of the business of selling such coals, which he agreed to do, in consideration of receiving half the profits, and the defendants furnishing him with money for carrying on the concern in which they had so become partners;—that it was part of the previous agreement between *Smith* and the defendants, that the former should be paid weekly for whatever coal he furnished them beyond the stipulated quantity, and that he should draw cheques for the amount;—that in the course of the carrying on of the said concern, large quantities of coal had been delivered by *Smith* to the partnership, and a great excess beyond the stipulated weekly quantity, and that the plaintiff had made, as acting partner and manager of the concern, various payments of money into the banking house of the defendants, and had drawn cheques on them in favour of *Smith*, at various times, on account of the excess, to the amount, at the death of *W. Thompson*, (who had been of the principal banking firm) of 500 *l.*;—that divers complicated accounts had arisen between the plaintiff and *Wm. Thompson* in consequence of the premises;—that after his (*Thompson's*) decease, at a meeting at *Smith's* residence, between *Wm. Thompson's* executors, *Smith* the plaintiff, and the defendants, certain accounts were stated and agreed

 upon,

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upon, in which the plaintiff did not interfere, and he (the plaintiff) was then (to his surprise) requested to sign a cheque produced by the defendants in favour of *Smith*, for the sum of 5,404*l.* 2*s.* 6*d.* which he (plaintiff) on the representation of one of the defendants, in whom he had much confidence, that he was required to sign it merely for their accommodation, and in order to enable them to settle *Smith*'s accounts with themselves and *Wm. Thompson*'s executors, after considerable hesitation accordingly did;—that having afterwards investigated the accounts of the said coal concern, he found that the said cheque comprized *all* the coals furnished by *Smith*, and not merely what had been delivered by him in liquidation of his debt according to his agreement, but also the weekly excess for which he was to be paid in money, and for which cheques had been previously given by plaintiff to *Smith*, which the plaintiff represented to the defendants, and requested them to correct the error, which they had promised to do but had not done;—that in *September* 1815, it was agreed that *Smith* should continue to deliver coals to the plaintiff on account of the defendants, in liquidation of balances due from *Smith* to them, the sale of which coals the plaintiff was to have the management and conduct of, as before the death of *Wm. Thompson*. And that in consequence of the premises, divers complicated accounts had arisen between the plaintiff and the defendants, which were still unsettled; and that a very large sum of money was due to the plaintiff on the balance, on account of his share of the profits.

On that statement of facts, the plaintiff charged that the defendants, knowing the plaintiff could not defend himself in the action at law, against the said cheques, they had refused to come to any settlement with him, and threatened, &c. unless, &c.

And he interrogated them, amongst other things,

Whether complainant did not draw some and what cheques in favour of *Smith*, for the amount or price of such coals as had been delivered by him, over and above the stipulated quantity in the said bill of complainant particularly mentioned and set forth?

Whether such cheques did not amount, at the time of the death of *Wm. Thompson*, to about the sum of 500*l.* or to some and what other sum?

Whether a certain cheque in the said bill, mentioned as having been signed by the plaintiff for the sum of 5,494*l.* 2*s.* 6*d.* did not purport to be the amount of all the coals delivered to the plaintiff, in discharge of the debts due to the said *Wm. Thompson* and the defendants respectively, or how otherwise?

Whether at the time in the bill in that behalf mentioned, or at some other and what time it was not agreed, that *Smith* should continue to deliver coals to the said plaintiff in further liquidation of the money owing by him to the said defendants?

The defendants in their answer admitted, that

 such

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such a partnership as had been charged had existed between the plaintiff and *Wm. Thompson*, but denied expressly that they were themselves partners in the concern, or had any thing to do with it, further than as bankers, with whom *Smith* and the plaintiff had opened an account; and they admitted that the plaintiff had made payments of money into the bank, for an account of which, they referred to a schedule annexed to their answer; and they also stated, that the plaintiff had drawn several cheques on them in favour of *Smith* or bearer, and that it was expressed in the body of some or all of such cheques, 'that the 'same were drawn on account of coals delivered 'by said *Charles Smith* to said coal concern of '*R. D. Askam* & Co. but whether said cheques 'expressed that same were drawn by said plaintiff 'in favour of said *Charles Smith*, for the amount 'or price of such coals as had been delivered by 'him, over and above the stipulated quantity in 'said bill mentioned, defendants cannot state 'either as to their knowledge, remembrance, in-'formation or belief, inasmuch as defendants say 'that said cheques are not in the possession of 'defendants, or of any or either of them, but that 'the same are now in the possession of Mr. *Moore* 'of *Leeds*, the late managing clerk to defendants 'in their said banking business; that they had no 'opportunity of applying to said Mr. *Moore* for 'said cheques, prior to defendants coming to '*London*, for that they were not served with the 'subpœna to appear to the bill, until the return-'day at a late hour, and that after such service, it 'was necessary for defendants immediately to come

'up

'up to town, to prepare and put in their answer to 'said bill, in order that they might not be restrained 'by the injunction of this Court, from proceeding 'in the action at law, which they have commenced 'against said plaintiff; and that they cannot, ex-'cept as therein before stated, set forth as to their 'knowledge, remembrance, information or belief, 'whether said plaintiff did draw any and what 'cheques in favour of said *Charles Smith*, for the 'amount or price of such coals as had been delivered 'by him over and above the stipulated quantity in 'said bill mentioned. And defendants cannot state, 'either as to their knowledge, remembrance, infor-'mation or belief, whether such charges as in the 'said bill of plaintiffs in that behalf mentioned, 'amounted at the time of the death of the said '*Wm. Thompson*, deceased, to about the sum of '500*l.* or any other sum in particular; that they 'believed that all the cheques which the said plain-'tiff drew on the said banking house of the said '*Wm. Thompson*, deceased, and these defendants, 'on account of the said coal concern, (which he 'carried on in partnership with the said *Wm.* '*Thompson*, deceased, alone) were made payable to 'bearer, except one; and that the said banking-'house of the said *Wm. Thompson*, deceased, and 'these defendants paid the amount of the said 'cheques to any person who presented the same at 'such banking house, and that the said cheques 'were paid at the banking house of these defend-'ants and said *Wm. Thompson*, deceased, as the 'banker of the said plaintiff, and the said *Wm.* '*Thompson* deceased who carried on the coal trade

 'under

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'under the firm of *R. D. Askam* & Co. wholly unconnected with these defendants, or any or either of them.'

To that answer the plaintiff excepted in the terms of the interrogatories.

Dauncey, and *Temple*, in support of the motion, contended, that the defendants could not protect themselves from answering, by stating that the cheques inquired of were in the possession of their clerk, who was not in town; and they submitted, that as the question was an important one to the plaintiff, the defendants were bound to answer it, and to give the discovery sought, as on that discovery their equity would arise.

Shadwell, and *Harrison*, for the defendants, contended, that as the question was general, it was not necessary that the defendants should answer it more particularly than it had been put. In the present case the alleged partnership had been positively denied, which put the ground of there being any partnership accounts unsettled between the parties wholly out of the question, and the defendants were merely proceeding to recover the balance due to them as bankers on the plaintiff's banking account. The general purport of the cheques they have given, the terms in which they were drawn would be surplusage, and not material as affecting these defendants, if they could be set forth, whatever they might be as between the plaintiff and *Wm. Thompson*.

Dauncey, in reply, attempted to draw the attention

tion of the Court to the general objects of the bill, and the tenor of the several interrogatories; but

The Court held, that they could not look beyond the exceptions, and that as the partnership of the defendants with the plaintiff and *Wm. Thompson* had been denied by the answer, the exceptions were rendered immaterial, for the answers sought to be obtained from the defendants could be of no service to the plaintiff in giving him any advantage which they would not as well furnish on the trial; and therefore the exceptions were

Overruled.

Dauncey, and *Temple*, then proceeded on the merits, submitting that the present was not merely a case between a banking house and their customers, but attended with complicated circumstances, which raised an equity on behalf of the plaintiff, of which it was incumbent on the defendants to rid the case before they could be suffered to proceed at law;—that it did not appear that there had been any conclusive settlement of accounts, or that the deceased partner, (who was also at the head of the banking firm, and therefore at least in some measure connected the plaintiff with the defendants,) had not agreed to allow the plaintiff a commission on the amount of the coals sold.—And it was not denied that he (*Wm. Thompson*) had himself drawn the cheque for the purpose of settling the banking books; against all which circumstances, the mere denial that the defendants were partners, as relied on by them, was not a sufficient answer.

Shadwell,

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Shadwell, and *Harrison*, observing, that where an injunction is prayed for on merits, the object is to obtain some discovery ancillary to the relief prayed by the bill; contended, that the defendants having denied the partnership, there was nothing laid before the Court on the part of the plaintiff, to shew them that their interference would afford him any relief, so that he had not made out such a case as called for the equitable interference of the Court, to restrain the defendants from proceeding in their action.

The Court held, that there was nothing in the case to prevent the defendant pursuing his legal remedy against the plaintiff, and therefore

Dissolved the Injunction.

HIRST

32 Rea 309

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HIRST *v.* PEIRSE.

11th July.

A plaintiff applying for an injunction to restrain a defendant from proceeding at law to recover the amount of a promissory note, on the ground that there are accounts subsisting between them, held to be precluded by having settled and signed an account leaving a balance in favor of the defendant.

And if there have been other subsequent accounts between them, the Court will not consider that a ground for interfering, where the defendant states that the plaintiff has withheld his accounts, and refused, though often requested, to come to a settlement.

Charges for business done, as attorney or agent, will not raise an account, so as to give such attorney or agent an equity against the holder of his promissory note, as money mutually due on either side will, for such demands are rather matter of set-off.

Nor does it destroy the effect in equity of a settlement of accounts that charges for business done before the liquidation of the accounts were not included in the account so *settled*.

To constitute what is called a material exception, or one on the opening of which an injunction will be granted, it is not only necessary that the charge is not fully answered, but the charge itself must be of such import that the answer will be of use to the plaintiff in his defence at law; and if that is not manifest, the want of answer will not entitle the plaintiff to an injunction.

THE plaintiff filed this bill (in *June* last) for an account and an injunction to restrain the defendant from proceeding further in an action at law commenced against him, on his promissory note for 4,000*l.* The bill stated, that the plaintiff had been for a long time engaged as confidential solicitor and agent for the defendant, receiving his rents, and managing and conducting the business of his estates and other property; in consequence whereof a considerable balance became due to the plaintiff, which, on a cursory survey of the accounts between them, in the year 1809, was supposed to amount to 4,000*l.* or thereabouts, which the plaintiff applied to the defendant to pay;—that the defendant borrowed that sum on his bond, and a mortgage of part of his estate, and paid it to plaintiff in liquidation of such balance, and that the plaintiff at the same time gave the defendant his promissory note for the same sum;

agreeing

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agreeing, at the same time, that if the balance should turn out to be more, or less, it was to be settled afterwards between themselves.

That the plaintiff afterwards continued to be employed by the defendant as aforesaid till the present year, and that no other settlement of accounts ever took place between them till about *March* last, when their mutual accounts were stated up to *December* 1816, and signed by both parties, whereby a balance of 97*l.* appeared to be due from the plaintiff to the defendant; but that such accounts were imperfect and erroneous, inasmuch as, although the plaintiff had continued to transact all the defendant's business from said month of *December* to *March*, and particularly in the conduct of a certain suit in Chancery, for which a considerable sum was due to plaintiff, which had neither been paid or included in the said account, and which, if charged, would amount to 4,000*l.*, or thereabouts.

The bill then charged, that several sums stated by the defendant in the said account to have been paid to plaintiff for his private use, were, in fact, trust-monies, and payable to certain other persons; and particularly sundry sums, of considerable amount, stated to have been paid to plaintiff in respect of the sale of certain estates; and that the defendant was considerably indebted to the plaintiff for transacting his private business: he therefore prayed, that an account might be taken of all the transactions between them, allowing plaintiff all reasonable charges for his professional and other services; and that the said

said promissory note might be delivered to the proper officer of the Court, or otherwise secured, for the benefit of the person eventually entitled thereto; and for an injunction, in the mean time, as to the action at law.

The defendant, by his answer, denied that the balance of account in the year 1809 amounted to 4,000*l.*; but admitted, that from the accounts rendered by the plaintiff in *December* in that year, he made it appear that a balance of 459*l.* 17*s.* 8*d.* was due to him. That, in 1815, plaintiff stated to the defendant that 4,000*l.* was due to him on the balance of accounts, although none had at that time been rendered to the defendant; and that he (the plaintiff) applied to the defendant for payment of such supposed balance, and that he the defendant assented to the plaintiff's borrowing the money on his (defendant's) credit, and retaining it for his (plaintiff's) own use, in discharge of such supposed balance, as alleged in the bill;—that by the accounts rendered in *March* last, there appeared a balance in the defendant's favour of 97*l.* 18*s.* 1*d.* exclusive of the sum of 4,000*l.*; and that such accounts were made out through means, and from documents, wholly in the plaintiff's possession.

He admitted also, the plaintiff having been continued afterwards in his employ, as stated in the bill, and that no charge was made in the said accounts for business done during the said period, or for conducting the said Chancery suit, which the defendant admitted that the plaintiff did conduct and manage; but he alleged that he had repeatedly, and in vain, applied for

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for his bill of charges on account of such suit, whereas for other business done by the plaintiff for the defendant he had given credit in the aforesaid furnished and settled accounts; and that, save as aforesaid, no other settlement of accounts ever took place between them, but that the accounts so settled were signed by both parties, and that he believed them to be correct and just;—that the plaintiff had never agreed with him for any stipulated allowance in respect of conducting the affairs of his property, and that he, the defendant, considered that the receiving his rents, which amounted to about 4,000*l.* a year, and which the plaintiff (who was a banker) always kept in his hands for a considerable time, or at least a very large balance, furnished an adequate compensation for his trouble in that respect; but, he admitted, that after the settling and signing the said accounts, the plaintiff stated that no charge had been made for receiving the said rents, and required that the same should be made, whereupon the defendant had requested that the plaintiff would make what charge he thought proper, which he had never since done.

The answer also stated, that the plaintiff had then a balance in his hands of the defendant's monies sufficient to cover any charges which the Court might be of opinion ought to have been included in the account so furnished to defendant by plaintiff as aforesaid, or which he may since have become entitled to be paid;—that, as he did not believe that the said accounts so furnished by the plaintiff were in any respect erroneous and imperfect, he was consequently unable to set forth as to his knowledge, belief, or otherwise, whether any and what sums in particular,

particular, or to any amount, or for what due, were or were not omitted, or for what reason, in such accounts; and that he was unable to set forth the particular description, or amount, of any of the particulars in the plaintiff's bill alleged to have been omitted in such accounts, or when, or for what, the same or any of them became due.

He therefore insisted, that, for the reasons stated, the said accounts, so settled, ought not to be disturbed or gone into; and that he ought not to be restrained from proceeding at law for the recovery of the amount of the said promissory note, so as aforesaid given for the ascertained balance in his favour.

Dauncey, and *Willis*, now moved for the injunction as prayed, on the opening of the following material exception to the defendant's answer: 'for 'that the defendant had not discovered and set forth, 'according to the best and utmost of his knowledge, 'remembrance, information and belief, a full true and 'particular account of the trust-monies in the said 'bill mentioned, which were paid by him to the 'said complainant, or which were received by the said 'complainant, with his privity and approbation, and 'consent; together with the times when, from whom, 'and for what, the same and every of them were 'so received.' And, 'for that he had not answered 'and set forth, in manner aforesaid, what charge or 'allowance is made in the said accounts for business 'done by the said complainant for the said defen-'dant as his attorney or solicitor.'

They

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They submitted, that it was no answer to those interrogatories, to say, that the complainant had full knowledge of all that was inquired of, because the documents from which the accounts were made out, were in the plaintiff's possession; for however that might be, the object was to get the discovery of the facts inquired of, by the defendant's admission, so that the plaintiff might use it at law in defending himself against the demand on the note.

In *Rowe* v. *Teed (a)*, and *Leonard* v. *Leonard (b)*, it was held, that a defendant is compellable to answer every thing which does not tend to self crimination, with the exception of the case of a purchaser for valuable consideration; and if such interrogatories as these are not to be answered, there would be an end of most of the exceptions which are so commonly brought before the Court.

Martin contended, that the answer was sufficient.

RICHARDS, *Chief Baron*.—We are of opinion that this is not what is called a material exception, or one which the defendant is bound to answer. There is great mistake, in general, *in this Court*, as to what is a material exception. The true way of arguing and considering such an exception, is by ascertaining whether, if the defendant should answer in the affirmative, his admission would be of use to the plaintiff. If it would, it must be answered; if not, it is not material.

The counsel on both sides then proceeded on the merits.

(a) B. Ves. 378. (b) Ball & Beat. p. 325.

RICHARDS,

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RICHARDS, *Chief Baron.*—This is an action on a promissory note; and there must be a strong case of equity made out by the defendant at law, to affect the note, to entitle him to the interference of the Court. His ground is, that there is an account subsisting between him and the plaintiff; and he endeavours to support it, by stating, that a large sum is due to him for services, in the character of confidential agent. But that is clearly nothing like an account. Work and labour is not matter of account. There must be monies paid or accounted for, both on one side and the other, to raise an account between parties. I never yet heard that agency merely was matter of account. It may much more properly be a subject of set-off; and if any thing should be due to *Hirst* for his services he must take that course.

The rest of the Court concurring, pronounced the

Injunction dissolved.

Friday, 11th July.

The Court will not allow more ehan two motions to be made successively by the same counsel, till they have gone through the rest of the bar.

AGAR, coming into Court to oppose a motion which was to have been made by *Dauncey*, and requesting that it might be brought on, the Lord *Chief Baron* stated, that two motions had been already made by Mr. *Dauncey*, and that the practice was, not to permit more than that number to be made by the same counsel, till they had gone through the Bar; and the rest of the Court expressing their approbation of that rule, said, that as it was one founded on convenience for the general accommodation of the Profession, it therefore would be strictly adhered to.

1817.

LR 1 Ch 326

SCOTT v. BECHER and WIFE, SHARP, (their Agent) and the GOVERNOR & Co. of the Bank of England.

Friday, 11th July.

An affidavit made in support of an injunction bill will be ordered to be filed, (although it is not in the course of practice to file such affidavits,) if the defendant require it, for the purpose of being afforded an opportunity of answering the matters contained in it.

THIS bill had been filed by one of the next of kin, (who was also a creditor of the intestate) against the defendants, who were the administratrix and her husband, and their agent, and the Bank, for an account of an intestate's personal estate, and that a receiver might be appointed, and for an injunc-

The Court will appoint a receiver of an intestate's personal estate, when the administrator is sworn to be insolvent *before his answer be come in*, although the fact *of his being abroad* stated in the plaintiff's affidavit be denied.

If a material fact be charged in a bill filed for an injunction, and also deposed to in the affidavit used in support of it, *not positively, but as the plaintiff has reason to know and that he believes it to be true*, and if that fact be one which, if true, lies within the knowledge of the defendant only, and who may, if not true, deny it, the Court will grant the injunction if it is not denied by him, for they will take his not denying it as an acknowledgment of its truth.

A plaintiff who has obtained an order for an injunction is not entitled, in point of practice, to serve it with the writ of execution before it be passed and entered, although it is usual to do so: and if he should so serve it, and there should be an error in drawing up the order, to the prejudice of the defendant, it will be considered a contempt, and so treated by the Court on an application to them to punish the plaintiff for so doing; nor will the plaintiff be suffered to avail himself of the excuse of its being a mistake; and all the costs incurred by the defendant, arising from such an irregularity, will be ordered to be paid by the plaintiff.

Though the Court will, on behalf of the next of kin, order a defendant, administrator, in whose hands there is shown to be a clear balance of the intestate's personal estate unapplied, and that it is in danger of being misapplied, to bring it into Court; yet they will expect a plain and strong case to be clearly and satisfactorily made out by the plaintiff.

A defendant, being in Court when the order for an injunction is made, is bound by it from *that time*, although it be not formally served till some time afterwards.

Semble, that an injunction, restraining an administrator from transferring the intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any of the intestate's outstanding estate which has previously come to his hands.

tion

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tion to restrain the defendants from transferring funds standing in the name of the intestate.

The suit was founded on the ground of the administratrix and her husband, (who had become insolvent) having gone abroad, and a previous misapplication of the assets.

1816. 16th December.

The defendants had appeared, but had not answered, and the plaintiff now (before answer), moved as above, on the authority of the cases of *Taylor* v. *Allen (a)*, and *Middleton* v. *Dodswell (b)*, and on an affidavit, stating that the husband of the administratrix was insolvent, and had with his wife gone abroad, and that the other defendant *Sharp*, their agent, was an uncertificated bankrupt.

It was required by the counsel for the defendant, that the affidavit, which, according to the practice, had not been filed, so that it could not be answered by the parties against whom it was to be used, might be filed; and that the application might be ordered to stand over till that should be done.

The Court ordered that it should be filed, for the purpose of giving an opportunity of answering it, and that another notice of motion should in the mean time be given, and they refused to grant the injunction in the mean time.—The Bank being parties,

(a) 2 Atk. 213. (b) 13 Ves. 266.

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20th December.

and having had notice of the motion, would not permit a further transfer.

Pepys now moved on the bill, supported by the affidavit, (which had in the mean time been filed) as before, for a receiver of the outstanding personal estate, and an injunction to restrain the defendants, *Becher* and *Sharp*, from selling out the stock belonging to the estate of the intestate, and particularly as to two sums of 900 *l.* and 500 *l.* standing in the funds in his own name; the affidavit stating that the sum of 900 *l.* had been transferred from the name of the deceased, into the name of the defendant *Becher*; and that the other sum of 500 *l.* which had been purchased by *Becher* afterwards, was purchased, as the plaintiff believed, from his acquaintance with the defendant's circumstances, with the produce of other stock, also part of the intestate's estate, which had been sold by the defendant *Becher*; and from collecting an outstanding estate.

The defendants affidavit denied that the defendant *Becher* was abroad, but did not effectually answer the fact of his insolvency.

The Court granted the receiver, and the injunction as to the outstanding estate, and also as to the sum of 900 *l.* but they refused it, with respect to the 500 *l.* on the ground that the plaintiff could not know with what monies it had been purchased.

The plaintiff afterwards drew up an order for the injunction, as to both the 900 *l.* and the 500 *l.* according to the terms of his notice of motion, extending

extending it to the 500 *l.* and without having it passed and entered, he served it with a writ of execution upon the parties.

The bill having been since amended, *Pepys* now moved again for a further injunction as to the 500 *l.* on an affidavit, stating that 1,100 *l.*, 3 per cent. consols, part of the intestate's estate, had been sold out by the defendant *Becher*, and that 500 *l.*, 5 per cents., had been purchased by him on the same day; and that the plaintiff, from his acquaintance with the insolvent circumstances of the defendant, *believed* that they could not have purchased that 500 *l.* except with the produce of the intestate's estate; and that having applied to the defendant's stock-broker, to inform him of the truth as to that fact, he had refused to give him any information.

On that affidavit, the Court ordered that the injunction should issue; and they said, that it ought to have been granted in the first instance; for that—where a party swears to his belief of a circumstance, which must, if true, be in the knowledge of the person whom the statement is meant to affect, and who has an opportunity of contradicting or denying it, if he choose to do so—if he do not deny it, such belief will be sufficient to induce the Court to take the circumstances as acknowledged, and to authorize them to interfere; and therefore in the present case they granted the injunction as prayed.

The fact of the order having been drawn up, as before stated, improperly including the 500 *l.* being mentioned to the Court by the counsel for the

 defendant,

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defendant, it was stated to have been done by mistake; and it was also said to be the usual practice in cases in the nature of waste, for the clerk in Court to draw up the order immediately, and for the plaintiff to get it served, with the writ of execution, on the parties before the order is passed and entered, as has been done in the present case; but,

The Court said, that though such a practice might be usual, it was improper. And they rejected the excuse of mistake in the drawing up the order; and added, that the plaintiff, by so doing, had committed a contempt, which they would have punished, if an application had been made to them for that purpose. And they ordered, that the defendants should be allowed all the costs occasioned by the irregularity.

11th July.

Pepys now moved, that the defendants *Becher* and wife, might be ordered, within ten days, to pay into Court the sum of 884*l.* 16*s.* 8*d.* or such other sum as should appear by their answer and the schedule thereto, to have come to their hands since the order for the injunction was pronounced, on account of the personal estate of the intestate, and not to have been properly applied.

The defendants, *Becher* and wife, had delivered in certain accounts by a schedule to their answer, charging the estate with money expended on account of it, as the payment of debts, &c. and also with claims of remuneration for work, and labour, and agency. Most of the former were objected to on account of the want of proper vouchers, and their dates, and the latter altogether; for it was contended,

contended, that if it were permitted to administrators to make charges for the alleged employment of agents, with respect to such estates, it would afford them the means of retaining any balance in their hands under such a pretext; but

The Court observing, that, although in general, in order to support such an application as the present, it was incumbent on the plaintiff to make out a very clear and satisfactory case of unapplied funds, in the hands of the defendant, by admission from his answer, (which might be made complete, by compelling him to give dates to his vouchers, &c.) before the Court would *brevi manu* take the money from him; yet they ultimately ordered the defendant *Becher* to pay into Court the whole sum as prayed.

Pepys also moved that the defendant *Sharp*, should be ordered to pay into Court 832*l.* 7*s.* 2*d.* as having come to his hands on the same account, and not applied by him thereto, since the 20th *December* 1810.

Sharp, by his answer, claimed a balance of upwards of 200*l.* to be due to him, after charging his agency, and the monies paid to *Becher*, or for the purpose of the estate, by his order.

Teed, for the defendant *Sharp*, contended, that if the injunction were held to take effect from the time when the order was pronounced, yet that as it did not extend to restrain the defendant from employing the money, which he had then actually received, in satisfying demands on the estate for the prevention of suits, he was at all events to be allowed for the sums so expended.

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It was then stated, that some of the money accounted for had been paid, after the injunction had been obtained: to which it was answered that none had been paid after the injunction had been served; when it was submitted, that the defendants having been in Court when the injunction was moved for, and ordered, it was a contempt to pay over any money even before service, and he had therefore done so in his own wrong, and the cases of *Skip* v. *Harwood* (c), *Osborne* v. *Tennant* (d), and *Kimpton v. Eve* (e), were cited as authorities establishing that point.

The Court held, that the defendant's knowledge of the order was sufficient to preclude him from being permitted to take any advantage of acts done by him in the mean time, which would affect such funds of the intestate as had come to his hands, so as to protect himself from a motion like the present, by having paid debts or other sums, which but for the injunction he might have been allowed, as covering any or all of the money sought to be paid by him into Court, and they determined that such an order operated to prevent a defendant from using monies, arising from transfers of the intestate's stock, or which had been received by the defendant before the order for the injunction had been obtained; and after disallowing all the items of discharge after the 20th December, the date of the injunction, *Sharp* was ordered to pay 89*l.* 13*s.* 9*d.* into Court.

(c) 3 Atk. 565. (d) 14 Ves. 136. (e) 2 Ves. & B. 349.

ROBINSON and others *v.* MULLETT and others.

1817.
Saturday, 12th July.

A solicitor who has acted to a certain extent only for parties, defendants in an amicable suit in Chancery, will not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves, against others of them, the solicitor making affidavit that he is not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, or has knowledge of any facts unknown to his clients.

It appears to be necessary that a solicitor, in such a case, should be shown to be possessed of knowledge of matters which might give him undue advantage, to found such a motion.

A BILL had been filed in the Court of Chancery, by one of the defendants in this cause (a residuary legatee) against the plaintiffs and the other defendants, (other residuary legatees and executors,) for the purpose of procuring the opinion of the Court upon the construction of the will. All the defendants in the suit in Chancery, which was an amicable one, employed the same solicitors to put in their answers. In consequence of disputes afterwards arising between the parties, the plaintiffs in this suit filed their bill against the executors, and other parties, to have the trusts of the will executed, and for an injunction and receiver; and employed the solicitor who had been employed by themselves, the executors, and the other parties, in the suit in Chancery, to prosecute that suit.

Fonblanque, on the part of the executors, on the authority of *Cholmondely* and *Clinton* (*f*), and an affidavit that the plaintiffs now solicitors had been retained by and were still acting as solicitors, as well for the plaintiffs as for the executors and others, and the now defendants in the suit in Chancery, obtained an order of Court, that they should be restrained by injunction from acting as solicitors for the plaintiffs in this suit, or as attornies or solicitors in any other suit at law or in equity between the parties.

(*f*) Coop. Rep. 80.

That

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ROBINSON and others v. MULLETT and others.

That order had been obtained in the absence of the solicitors who were the object of it; and now

Agar, and *Teed*, moved, that it might be set aside on that ground, and on the deposition of the solicitors, that they were not in possession of any secrets of the defendants, or any information whereby their interest could, in the slightest degree, be prejudiced; and that all communications made by the defendants to them, had been made in the presence of the plaintiffs, or subsequently related to them by the deponents.

The Court held, that the employment of these solicitors for the present plaintiffs by such of the defendants as they had acted for in that suit, and to such an extent only, was too slight a ground for the application to restrain them from acting in this cause, as there did not appear to have been any important confidential matter disclosed to them, the knowledge of which might be used in prejudice of the party so applying. Therefore, as to that part of the order, it was

Discharged.

LEATHES (Clerk, Rector of the Rectory of the Vicarage of *Mepal* and Vicar of *Sutton*,) *v.* NEWITT and others, occupiers of lands and farms in both the parishes, and the Dean and Chapter of *Ely*, Rectors of the parish of *Sutton*, and their lessees.

1817.
Friday, 11th July.

Modus of 1*s.* for a milch cow, in lieu of the tithe of milk of such cow, sent to an issue.

Modus "of 1½*d.* "for every "calf fallen "or dropt in "the parish, "in lieu of "the tithe of "such calf,"

THE plaintiff filed this bill as rector of *Mepal* and vicar of *Sutton*, (Isle of *Ely*, county of *Cambridge*,) for the great tithes of the rectory of *Mepal*, and the small tithes of the vicarage of *Sutton*, and also the great tithes arising in certain parts of the parish of *Sutton*, (the vicarage,) and particularly in *North Fen*, and *Holts* or *Holbrooks*, parts of a certain district of fen or marsh-land, being several, or late inclosed fen-grounds, within the said parish

is not proved, if the evidence add a qualification to the custom; as, if the proof be, that where such calf shall be sold within the first year after being calved, a further sum, after the rate of 1*s.* in every 10*s.* of the price at which the calf was sold, is to be paid to the vicar.

As to the effect of certain ancient documents, and the conduct of parties, given in evidence in this case, as tending to negative a rector's common-law right in favour of a vicar without proof of perception, claiming against him the *great* tithes in the *vicarage*, see the documents (in the Appendix,)—which appear to be of so singular a character, that there have been none among the many ancient records and instruments brought before the Court in tithe causes which, by analogy in their contents, or by reasoning on their effect, can lead to any conclusion as to their operation as matter of evidence in questions, where, in the absence of positive proof, perception and usage are so much resorted to as in cases of this description,—and see the evidence, and the conclusion of the Lord Chief Baron's judgment—where the Court were of opinion, that the effect of such documentary evidence had so obscured the *primâ facie* right of the rector, as that they were obliged to direct an issue to put the case in a course of further inquiry.

Evidence of reputation of certain lands having been inclosed in pursuance of an agreement, not admissible.

Copy of a lost terrier rejected as evidence.

For other points, see the marginal notes in the case *passim*.

of

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LEATHES v. NEWITT and others.

of *Sutton*, containing 3,700 acres, or thereabouts, situate in a fen called *Sutton Fen*, and for agistment.

The defendants, the dean and chapter of *Ely*, rector of *Sutton*, admitted the plaintiff's title, as vicar, to all *small* tithes in *Sutton*, except saffron, osiers, and mills, which they claimed as appropriators, denying his title to great tithes in the *North Fen*, and *Holts* or *Holbrooks*, which they also claimed, as well as the great tithes of all other parts of the parish, as appropriators; and their answer stated, that they had always let the rectory of *Sutton*, which was now let to others of the defendants; and that if the occupiers of any of the lands or farms in *Sutton* had paid any of the excepted tithes to the vicar, they had done so wrongfully; and, admitting that no great tithes, or agistment, had been received by them from *North Fen*, they insisted that their rights were nevertheless not affected by the *laches* of their lessees.

The defendants, *Newitt* and *Cole*, (occupiers in *Mepal*,) denied the plaintiff's title to *all* tithes, great and small, in part of the parish of *Mepal*; for as to that, they insisted that there was a certain fen, called *North Fen*, or *Sutton Fen*, situate within the parishes of *Mepal* and *Sutton*, and that such part as was situate in *Mepal*, and the titheable places thereof, consisted of 500 acres; and that the plaintiff (if he were rector) was entitled to tithes in kind of wool and lambs, and to certain moduses in lieu of the tithes of milk, calves, and foals, and also to the

the tithe in kind of pigs, provided he kept a boar for the use of the parish, and to no other tithe, either in kind, or *sub modo*, in that part of the fen lying within the said rectory.

They then set up a defence of exemption for that same part of the fen, as being part of the possessions of the dissolved priory of *Ely* *.

Next, they pleaded, that the occupiers within the rectory, including the said 500 acres, had paid the following moduses; "1*s.* for every milch cow, "in lieu of the tithe of milk of such cow; 1 ½ *d.* for "every calf fallen or dropt in the parish, in lieu "of the tithe of the said calf, and 2 ½ *d.* for every "foal, in lieu of the tithe of the said foal."

Newitt further stated, that he occupied only thirteen acres in the *North Fen*, and had had no titheable matters thereon; and *Cole*, that he occupied thirty acres there, and had had thereon most of the titheable matters charged by the bill. And they alleged, that the plaintiff having let all his tithes to one *Jellings*, except the moduses for the milch cows and calf, had no demand; and *Cole* further stated, that he had paid all the tithes due from his farm to the lessee, except 15*s.* 9*d.* due up to *Michaelmas* 1811, for the moduses for milch cow and calf.

* That defence was abandoned at the hearing.

On

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On the part of the defendants, in answer to the plaintiff's claim in *Mepal*, it was proved, that among other payments set up as modoses, 2½*d.* had been paid in lieu of the tithe of each foal within the parish, as far back as living memory; and that the same had been a fixed payment in all cases where the breeders of the same foals kept the same for more than twelve months; but when they sold the same within twelve months after foaling, then, *in addition to the said sum of* 2½*d. a further sum, at and after the rate of* 1*s. in every* 10*s. of the price at which the said foals were sold.*

So also one halfpenny for calves weaned, except they were sold within the first year after being calved, *in which case the vicar was paid one tenth of the price.*

The same defendants, and others, occupiers of lands in *Sutton* parish, denying the plaintiff's title, admitted the vicar's right in *Sutton* to tithe of hay from certain lands called the *Cottage Homesteads*, a few pieces of meadow in the high lands, and mead-lands, and within a certain fen called *Middlemoor*; and that the plaintiff had received the tithe of hay from a certain farm called *Sutton Holwood*, and *Little Holwood* farm, but denied the vicar's title to hay in any other part of the parish; and alleged that it had never been received by any vicar, for that the vicar was not endowed of hay, even in the places from whence he received it; and

and that he received it therefrom, or some compensation in lieu thereof, under some agreement between the dean and chapter of *Ely*, to whom the farms of *Middlemoor* and *Little Holwood* belonged, and some or one of the preceding vicars.

They also denied his right to, or that the vicarage was endowed of, tithe of corn within the vicarage, except that by virtue of the aforesaid agreement he had received the tithe of corn, or some compensation therefor for the said farm of *Little Holwood*. They admitted the vicar to be entitled to tithes in kind of lambs, wool, and pigs, and by modus to calves, milk, and foals, and to seeds, and orchard-fruit in kind, from lands called the *High Lands*, but denied his right to all other tithes, except that the vicars had received, by virtue of the aforesaid agreement, the tenths of all the profits of the said farm, called *Sutton* or *Little Holwood*; and admitted, that he and some of his predecessors had received by virtue of some other agreement, the tithes of grass and fodder growing upon the said fen, called *Middlemoor*.

They also set up the following moduses;—"5*d.* for every milch cow in lieu of the tithes of "milk of such cow; one halfpenny for every calf, "for the tithe of such calf, and a tenth of the price "if sold; and 2½*d.* for every foal, in lieu of the "tithe of such foal."

The other defendants, lessees of the dean and chapter of *Ely*, claimed the great tithes under their lessors, as appropriate rectors of *Sutton*.

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The evidence produced on the part of the plaintiff, as vicar of *Sutton*, was, (having proved his title) a general perception of the great and small tithes of that part of the inclosed fen called *Little Holwood*, by a compensation, and so for another part of the same fen called *Cocksnest*, and from other parts of *Sutton* parish, not being part of *Sutton* fen; and that he and his predecessors had received small tithes generally throughout the parish of *Sutton*. It was also sworn by *Jellings*, a lessee of the plaintiff (by indenture,) of all the tithes of *Mepal*, great and small, for a term of seven years, that he had received such tithes from the defendant *Cole*, for the thirty acres, part of the 130 occupied by him in *North Fen*, and that he had received the small tithes only for the remainder.

It was proved that *Sutton Fen* had been inclosed by a decree of the Court of Chancery, in the reign of James the first, founded on an agreement entered into between all parties at that time interested: that *North Fen*, and *Holts* or *Holbrooks*, were called together by the name of *Sutton Fen*, and were in the parish of *Sutton*: that for those parts the dean and chapter of *Ely* had never received great tithes, but that they had received them from divers parts of the high, arable and pasture lands: that the proportion of *Sutton Fen*, situate in *Mepal* parish, was between five and six hundred acres, and that the remainder (about 1,200 acres,) was situate in *Sutton* parish: that the district called *Cocksnest* was in *Sutton* fen and parish.

In

In support of the claim of the great tithes in *Sutton*, the plaintiff also proved, that the districts called *North Fen*, and *Holts* or *Holbrooks*, situated partly in *Mepal*, and partly in *Sutton*, and that the district called *Sutton, Little Holwood*, and *Cocksnest*, were situate in the parish of *Sutton*, and were called by the name of *Sutton Fen*, and that the whole had been for a long time inclosed and occupied in severalty: that the vicar and his predecessors had received, by their agents, from the occupiers of *Little Holwood* farm, and *Cocksnest*, money-payments in lieu of the great and small tithes, *but not for the great tithes from any other parts of the parish of Sutton.*

It was also proved from the vicar's books, that they had on many occasions been paid sums of money in lieu of the tithes of the articles said to be covered by the moduses, differing in amount, and other respects, from the alleged immemorial payments.

[That part of the depositions which were proposed to be read, to prove that the lands were reputed to have been inclosed in consequence of an agreement entered into in 1622, was objected to, and rejected.]

There were also produced in evidence the following documents. On the effect of leases marked with italics, and on the agreement and decree, as it regarded *Mepal*, and the right of the rectors to the great tithes in *Sutton*, much of the case mainly rested.

They consisted of various leases granted from time

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to time by the dean and chapter :—The first was a lease of *Sutton* rectory (of the 1st *Eliz.*), demising the rectory, with *all* the tithes, without excepting the advowson of the vicarage, or making any reservation in favour of the vicar ;—the next produced was of the 29th *Eliz.* also of *Sutton* rectory, and demising *all* tithes, but excepting the advowson, and augmenting the vicarage with two quarterns of corn. A lease of the 16th *Jac.* of *Middlemoor*, to certain of the inhabitants of *Sutton*, wherein the vicar was to enjoy a piece therein mentioned, called the *Harp*, and the gatestead therewith ; the crop of the part belonging to the vicarage-house, and the tithe of the grass and fodder of *Middlemoor* ; and if *Middlemoor* be fed with cattle before *Lammas*, the lessees covenanted to pay the vicar 16*l.* a year in lieu of tithe :—A lease of *Little Holwood* (of 2d *Car.*) to a person of the name of *Church*, for seven years, containing no reservation of the tithe to the vicar : a similar lease (4 *Car.*) of *Sutton* rectory to *Story*. *A second lease* (6 *Car.*) *of Little Holwood to Church, in which the tenant covenants to pay* ALL THE TENTHS yearly of ALL THE PROFITS that shall grow, arise, &c. from the demised premises *to the vicar of Sutton* for the time being. Several other leases of *the rectory* were also put in evidence, and were in nearly the same terms as that granted to *Story*, coming down to very modern times.*

A decree of the Court of Chancery (21 *Jac.*) † ntitled, *Sutton* and *Mepal* decree, and which ad-

* For the terms of one of the latest of the leases. See the Appendix.

† See Appendix.

verted

verted to the bill filed by Dr. *Cæsar*, then dean, and the chapter of *Ely*, whom it described as *lords of the manors of Sutton and Mepal*, against the *tenants* (by name) amongst whom (and described also by name, as one of the *tenants*) was the then vicar of *Sutton*, after reciting, that by reason of the promiscuous feeding of the fens and marshy grounds, they had been more injurious than profitable to the commoners; and that therefore the dean and chapter, as lords, had entered into an agreement with the tenants, that the said dean and chapter (lords, &c.) should retain to them and their successors, in severalty, all that fenny ground in *Sutton* called *Little Holwood:* it was agreed that all the residue of all the fen-ground, except *Mepal Gall*, should be divided as follows: first, there shall be laid out and allotted to every manor-house, freehold and copyhold, and farm-house, and every other dwelling-house, and to every owner of arable or upland-grounds, &c. (certain different definite allotments). The fines on the admission of copyholders to be certain. It then set out the answer of the defendants, admitting the allegations, particularly the inaptitude of the fen to *the feeding and depasturing of cattle*; and prayed that the agreement might be ratified and decreed.

It then gave the *several* answer of the *then vicar*, admitting complainants to be *lords of the manor* and lordship of *Sutton*, whereof *the defendant was incumbent*; and that within the said manors were spacious commons, being fenny ground, wherein the tenants which did inhabit in any of the an-

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cient commonable houses or tenements therein, and *the vicar* of the town of *Sutton*, had, *in right of the vicarage*, used and accustomed to have common of pasture for all the cattle, levant and couchant, belonging to the said commonable houses, the *vicarage* being likewise a commonable house; and that such promiscuous feeding, &c. was injurious, and therefore, that he agreed to the before-mentioned allotment; so that the defendant (the vicar) might have for his part allotted unto him, and *the succeeding vicars*, 20 acres (by the particular admeasurement), lying, &c. called, &c.; in consideration that neither he nor the succeeding vicars after him, should thereafter demand, *in right of his and their vicarage, any tithes* out of any the said commons after such allotment, *except the tithes of milch kine, calves, foals, sheep, pigs, geese, and such like; and except the tithe of one fen called Little Holwood.* The agreement was accordingly decreed; and a commission having been awarded, the allotment agreed on was set out to the vicar in the terms and on the conditions of the agreement.

For the defendant, (the rector of *Sutton*,) there was also put in a case of *Foster* v. *Tymbs*, in *Hil.* 1672, where the then rector sued the defendant by bill for the great tithes of a part of the fen which *Tymbs* had ploughed; and when the cause was ready for hearing the defendant gave it up.

[A paper purporting to be a copy of a lost terrier was offered in evidence, but objected to, and rejected.]

Dauncey,

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Monday 2nd. Thursday 6th February. Thursday, April 23.

Dauncey, and *Hall*, for the plaintiffs, contended (the defence of the lands having belonged to a religious house having been given up), with respect to the moduses set up for *Mepal*, that the payment of 1*s.* for a milch cow was rank, and they cited *Franklin* v. *The Master*, &c. of *St. Cross* *; and that the other two moduses were not proved as laid, and therefore could not be established by the evidence, (citing the cases of *Bishop* v. *Chichester (a)*, *Leigh* v. *Maudsley (b)*, *Scott* v. *Fenwick (c)*;) and they brought forward, to destroy their validity as moduses, the entries from former vicars books, which proved that other payments had been made, varying from those now set up, as to that part of the cause which lay between the rector and vicar, on the claim of the latter of the great and all the small tithes of the parish of *Mepal*.

They then submitted, that as they had shown, by conclusive evidence, perception of the great tithes in some parts of the parish of *Sutton*, the Court would presume an endowment of those tithes in favour of the vicar, in the parish generally—that his non-perception hitherto had arisen from the delusion that he was bound by his predecessors agreement, and the decree of 1622, and could not therefore claim them; whereas, in point of law, the successor could not then be bound by the engagement

* Bunb. 7.

(a) Gw. 1321. (b) Ib. 703. (c) Ib. 1250.

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of his predecessors *,—that it was in proof that the vicar had accepted an allotment on the inclosure of the common, in lieu of tithes—that that having been the result of an agreement entered into by one of his predecessors, at a time when they had no power to bind their successors, although void, was of use to the vicar now, to shew that he was then entitled to the tithes throughout the parish, or at least over the fen; and that must be in as ample manner as he had them from the parts of the parish now, for his general right must have been as full as his particular enjoyment. They therefore contended, that, receiving at this day all the tithes, both great and small, from certain parts of the parish, it was proof that they were entitled originally to such tithes from all the rest; and as the long non-user might be accounted for from the effect of the allotment, under the agreement of the preceding vicars, who no doubt considered themselves bound by it, there was nothing in this case opposed to the plaintiff's claim. The great tithes must be due to one of these parties;

* The doctrine of non-perception of tithes being unavailable as against a vicar, where it may be attributable to a mistake of the law, appears to have been recognized in the case of *Dorman* v. *Curry*, lately decided by the present Lord Chief Baron †, since this case was argued; where one point ruled was, that perception by a rector of the tithe claimed by the vicar, but which it had been long doubtful in point of law, as to which of them it was payable to, did not destroy the vicar's right.

† *Ante*, p. 110.

and

and the rector, so far from claiming them, has constantly paid them to the vicar.

Wetherell, Clarke, Newland, Boteler and *Richards*, for the defendants, in answer to the objection of the rankness of the 1 *s.* modus, cited *Hawes* v. *Goodman* (*d*), and *Roe* v. *Bishop of Exeter* (*e*); and as to the objection of variance between the laying of the other moduses, and the proof, they insisted, that the allegation had been borne out by the evidence; more had been proved, it was true, but that was not destructive of the plea, though it might have been so, had the evidence fallen short of it. The qualification superadded was not, they submitted, an integral part of the modus, and the proof carrying it farther had put it more favourably to the rector. As much had been alleged, as covered the defendant's case, and more would have been idle, or at least was not necessary. In the cases which have been cited, the variation was material, but it is not so here.

They then submitted, that if those payments had not been sufficiently proved, the plaintiffs themselves had proved other payments for the defendants; and that they were entitled to an issue on that ground.

On the greater question, of the plaintiff's claim against the rector in *Sutton*, they contended, that

(*d*) 2 Wood, 288. (*e*) Bunbury, 57.

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the vicar had not made out his case to support his claim to the great tithes of the vicarage of *Sutton*.

The vicar produces no evidence; yet says, if I show perception in part, I am entitled to claim for the whole. A vicar is imperatively bound to give some proof, either positive, or by implication, of his having been endowed of the great tithes of a vicarage. The decree put in will not supply the absence of either of those accustomed modes of proof of an endowment.

As to the effect of the evidence of the leases, they urged, that those leases were in fact augmentations, merely emanating from the usual bounty of that day, in favour of the church; if, therefore, the decree was out of the way, there would be not a shadow of foundation for this claim by the vicar. There is however no recital there of any right in the vicar; and it is not probable that the 20 acres had been given him in commutation of his right to all the great and small tithes of those 3,700 acres of land which the parish consisted of. It is incumbent on a vicar to prove his case against a rector; and here is nothing like evidence to support his claim against the rector's common-law right. They insisted also, that the decree itself furnished evidence against the plaintiff's claim, not merely from the incommensurate and inadequate allotment given him in commutation for so large a claim, but from the species of tithes reserved, which are subsequently enumerated.

RICHARDS,

RICHARDS, *Chief Baron*, now delivered judgment.—[Having stated the case.]—The plaintiff filed this bill in two distinct characters, as rector of *Mepal*, and vicar of *Sutton*. One of the principal defendants (*Newitt*,) denies his having had titheable matters; that however is disproved; another (*Cole*), admits that 30 acres of his land are liable to pay the vicar tithe.—The other 100 acres he attempts to cover, because, he says, they are in the *North Fen*.

These defendants had at first set up a claim of exemption from payment of all tithes, but that was abandoned at the hearing; and it was impossible to make that case out by the evidence. They thus admitted therefore their liability to pay tithes either in kind, or otherwise. But then, they say, that certain of the tithes claimed by the vicar are covered by the following moduses:—1 *s.* for every milch cow, in lieu of the tithe of milk of such cow; 1½ *d.* for every calf, fallen or dropt in the parish, in lieu of the tithe of the said calf; and 2½ *d.* for every foal, in lieu of the tithe of the said foal.—Now it has certainly been decided, in the case of *Franklyn* v. *The Master, &c. of St. Cross*, that 1 *s.* for a milch cow is rank *(g)*. On the other hand, however, there have been cases where issues have been granted to try such a modus.—Here also, therefore, I must direct an issue to try that modus.

As to the other moduses for calves and foals, they are differently situated. They are not proved

(g) Bunb. 78.

by

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by the evidence as laid in the answer, inasmuch as they are pleaded as positive payments simply, and without any qualification; whereas the evidence adds this important and material qualification, that if they were sold within the first year after being calved or foaled, a further sum, after the rate of 1 *s.* in every 10 *s.* was payable to the vicar. That evidence, therefore, destroys rather than supports the character of payments, attempted to be established as moduses. If the tithe of those articles is to be so augmented in such cases, it is a most important variation in favour of the rector, who by common law would not be entitled to the advantage which such a custom gives him, and therefore it is important to him to know it precisely, and it must be so set out. Whether such a payment, if it had been laid as proved, would have been good, is another question. It is sufficient here to say, that it is destructive of the defence of modus, that the allegation and the proof differ in the material respects which I have pointed out; and if the plea is not supported by the evidence the Court cannot receive it.—The Court cannot direct an issue to try part of a custom; all customs are in their nature entire, and all the parts must be taken together; we cannot separate it, and say what part shall be tried, and what shall not. In *Bishop* v. *Chichester* (*h*) the Court so determined; and in *Scott* v. *Fenwick* (*i*) the Court would not direct an issue to try a payment which was laid generally, but proved to have been made with an exception.

An issue will not be granted to try part of a custom.

(*h*) Gwil. 1321. (*i*) Ib. 1250.

The

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The rector must therefore have a decree for an account of those titheable matters for which the moduses pleaded are not proved, the calf and foal.

Then let us see whether the defendants are right in the other points of their case.—It is contended, that the vicar has himself proved moduses for the defendants, by the payments which he has given in evidence from the books, and that therefore he cannot have a decree, because those payments should be sent to be tried.—If he had done so undoubtedly he must have failed; but I am of opinion that he has not.—He has certainly proved that other payments have been made, and that those are inconsistent with the payments set up by the defendants as moduses; but he has not proved that they are immemorial or uniform payments, or that they have any of the requisites to constitute moduses.

Other money-payments put in evidence by a vicar than those set up by the occupier, cannot be considered moduses, unless he also show by the evidence that such payments have the requisites of moduses in point of fact, as that they are of immemorial origin, and invariable amount. There is otherwise no ground for saying that the defendants are entitled to have an issue to try them.

The defendant, *Cole*, next says, that for some valuable consideration the plaintiff let to *William Jellings* all the tithes of all the titheable matters in the parish, except the modus for the milch cow and calf; and that he had paid *Jellings* all that was due, and insists therefore on his discharge. The defendant, *Newitt*, also relies on the same lease, if it avails *Cole*. In support of that defence the lease is produced, from which it appears, that the term expired in *Michaelmas* 1809, and whether the plaintiff meant to grant all the tithes or not is not now to be inquired. Then they say, that he farmed the tithes under a parol agreement; to which it was objected, that tithes are not the subject of a parol

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parol lease; and if that were so, *Jellings* would have had no right to receive them; and if he had none, the plaintiff would; at all events, it is clear, that the plaintiff was not entitled to tithes down to *Michaelmas* 1809, therefore we are to direct our attention only to the subsequent time.

Now *Jellings* says, that from 1809, he held under a parol agreement, and that he received all that *he considered* due for the tithes from *Cole*, except the tithes of calf and foal. If indeed that appeared, notwithstanding the agreement was by parol, probably the rector would not be entitled to recover the value again from *Cole*. If they had not been received it would be another question. It is however stated, and it is a very loose expression, that *Jellings* received all he considered due from *Cole*; and it is hardly to be supposed, that when the exemption was understood by *Cole*, on which he has insisted, that he would have paid those tithes; but the agreement being by parol, the precise terms do not appear. It has been said, that no tithes were considered due from the lands in question, because they were in *North Fen*; whereas it is quite clear that *Cole* had some land liable to tithes, and therefore I think the plaintiff entitled to a decree for all the tithes he demands for those lands, from *Michaelmas* 1809, except for milk. That is all that relates to the rectory of *Mepal*.

Then the plaintiff, as vicar of *Sutton*, claims all the tithes, great and small, of the *North Fen* and *Holts* or *Holbrooks*, and some other parts of *Sutton* parish,

parish, containing 3,700 acres, situate in a fen called *Sutton Fen*. Some of the defendants occupy lands in the fen. The other defendants, the dean and chapter of *Ely*, are rectors, and they and their lessees claim the great tithes as rector; but with respect to the small tithes the rector admits the vicar's title to all, except saffron, osiers, and mills, which are at present not in question. The occupiers and rector deny his right to great tithes, and the occupiers also deny his title to ALL the small tithes; therefore the question is much narrowed by the rector (who is entitled at common law) admitting the vicar's right; and thus it lies merely between him and the occupiers as to the small tithes. They admit the plaintiff, if he be vicar, to be entitled to the tithes of hay within certain known lands, called *Cottage Homesteads*, a few pieces of meadow in the high lands, and a few pieces of meadow in the mead-lands; and that he had received the tithe of hay from a certain farm called *Sutton Holwood*, or *Little Holwood* farm, under and by virtue of some agreement between the dean and chapter of *Ely*, to whom the same belonged, and some or one of his predecessors; and that he had also received the tithe of grass and fodder from the fen called *Middlemoor*; but they deny that he is entitled to hay from any other parts of the parish. They also admit him to be entitled to certain small tithes, and that the other are payable to the rector. The rector however disclaims. Then they say that certain small tithes are covered by moduses: "5*d.* for "every milch cow, in lieu of the tithes of the milk "of such cow; one halfpenny for every calf fallen "or dropt in the parish, in lieu of the tithe of the "said

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"said calf, and a tenth part of the price, if sold; "and a modus of twopence-halfpenny for every "foal fallen in the said parish, in lieu of the tithe "of such foal."

The modus for the cow has been proved, and so has the halfpenny for every calf; but the modus of twopence-halfpenny for every foal having been, as in the former instance, laid without the qualification which is annexed to it by the proof, that will fall under the same objection as was applied to the other part of the case, and as to that, there must also be a decree for an account in favour of the plaintiff.

Non-perception of vicarial tithes by either vicar or rector, (the latter admitting the vicar's right, except as to certain titheable articles, there being no third claimant,) in certain parts of the parish throughout which the vicar receives some small tithes, is negative evidence in favour of the vicar's right to all other than the excepted articles.

Disclaimer of a rector binds his lessees.

Then, the rector admitting the right of the vicar to all small tithes, excepting the excepted articles, and the occupiers admitting it also by the inference afforded by the disclaimer of the rector, as the small tithes must be due either to the rector, or the vicar claiming under him, we must take it to be proved that the vicar is entitled to all other small tithes generally. His title to agistment might have been doubted; but that where the title is general, with certain express exceptions, and the rector is not proved to be entitled beyond those exceptions, we must consider the evidence of perception as applying to all, and must presume the vicar to have been endowed of all the other small tithes arising within the parish. I am of opinion therefore, that he is entitled to an account of all the other small tithes, except such as are covered by the moduses which have been established.

On

On the modus for milk, therefore, there must be an issue. On the calf-modus, which was laid and proved as one entire custom, there must be an issue also. The modus for foal lying under the objection already mentioned, there must be an account for that tithe.

We then come to a very important part of the case, as it affects the interest of all the parties before the Court; for although the question is chiefly between the rector and vicar in substance, yet it is of importance to the occupiers to sustain the denial by the rector, of the vicar's right, on account of the question of costs.

The *vicar* claims the *great* tithes of the *North Fen*, and *Holts* or *Holbrooks*, which are places situate within the vicarage.

In support of that claim, there is no endowment, or even any terrier, produced; and the case rests solely on the agreement of 1621, and the subsequent decree. It becomes important to see how the matter stood before that agreement was made. There is no evidence of any endowment of the great tithes of the parish; but it appears that the vicar had perception of the great tithes in *Middlemoor*, *Mead-land*, *Cocksnest*, and *Little Holwood*; but the defendants say, that those are not parts of the fen, and that therefore, that perception cannot apply to the land inclosed in the time of *Charles* the first; and that, therefore, perception of tithes there, is not evidence of an endowment of the great tithes of the fen, or of those of any other part of the parish,

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parish, than where perception has been proved to have been had. There is no mention of any tithes paid to the vicar in the leases of the reign of *Elizabeth*. Then, in *James* the first, there is a lease of the rectory, with a covenant that the lessees should pay tithe to the vicar, showing, therefore, that something new had arisen between the time of *Elizabeth* and *James*. It is difficult to say what construction should be put on these transactions. It appears clearly from the latter lease, that there had been perception of tithe of hay by the vicar, before the decree, but with respect to the effect of the proof of that fact on this question, it is difficult to say what is to be inferred from the lease. It is certainly unusual for lessors so to make voluntary provision for the church, in their leases to tenants, by forcing them to pay tithes to the vicar; but as to its being an augmentation, there is no foundation or pretence for such a supposition, for the vicar is not a party to these leases. The law on that subject was not passed till the time of *Charles* the second, subsequently to the Restoration, and this lease was made in the time of *James* the first.

I now pass on to *Sutton*, or *Little Holwood*, and there there is the same covenant in the leases as was contained in the other. I feel insuperable difficulty in saying what ought to be the effect of these transactions; but it is not of so much importance in my view of this case.

The defendant's argument is, that the leases operated as an augmentation to the vicar; and that as to other parts, where he has received tithe, we ought

ought to presume a similar origin, and not an endowment; and that it is not to be presumed, where the perception is confined to particular places, that the endowment, if there was any at all, was applicable to the whole fen.

On the other hand, the vicar is not a party to those leases; and augmentations were not referred to by statute till long after the Restoration.

Then the agreement of 1621, on which all turns, comes to be considered. At that time vicars were not competent to bind those who came after them; so the law stood then. In the decree, the dean and chapter are described, not as rector, but as lords of the manor. It also appears from the agreement, that the subject of it was marsh-land, and common, not producing any great tithe; and it is to be gathered from it, that the expectation was, that the property was likely to be used as pasture in future times. The rector and vicar had both an interest in the common, independently of their ecclesiastical right; and the vicar is described as a *tenant* as well as vicar. There is nothing throughout the whole decree which speaks of the dean and chapter, *as rector*, or *as claiming tithes*; on the contrary, it rather looks like an abandonment of their claim, although there is nothing expressed to show that any right was given up by them, in their character of rector. I will only observe further on this paper, that it appears from it, that the allotment was made to the vicar of *Sutton*, as vicar, and also as tenant,

 probably

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probably in respect of his glebe. The order is, that *Richard Wigmore*, clerk, the then incumbent in *Sutton*, and his successors incumbents there, should, in right of their vicarage, have and enjoy for his and their allotted part, 20 acres, for and in lieu of his and their right of common, in consideration, that neither he nor any of his successors, shall thereafter claim or demand, in right of the said vicarage, tithes out of any the aforesaid commons, after they shall be allotted, except tithes of milch kine, &c. and such like, and except tithe of one fen, called *Little Holwood*. Now of *Little Holwood* the rector was owner, and thenceforth, from that district, the vicar has confessedly received all the tithes both great and small.

But before this decree there was, certainly, no evidence of any thing like an endowment of great tithes; and the question is, whether it is not to be gathered from that document, that the tithe of all titheable matters is not admitted by the rector to belong to the vicar. It is altogether a singular transaction. The dean and chapter have never once described themselves as rector, which, if they were conscious of having any right to tithe in that character, is certainly very extraordinary. The vicar, on the contrary, had a claim to some tithes, and he takes an allotment. There is nothing in the agreement to affect the rector's right, if he had any, as is the case with the vicar. *Prima facie*, the rector had a right, but the silence of the decree makes against it. Then it must be noticed that they

they have *paid* tithes for *Little Holwood*, and they have not received nor claimed tithe themselves; yet the great tithes must be due to one of them, for there is no third claimant.

The vicars, on the other hand, have also never received any tithe, or made any claim till the present time; but the plaintiff accounts for that by saying, that they thought themselves bound by the decree not to demand them. It may have happened too that no great tithe might have arisen till lately, so that the attention of either party might not have been called to the subject. It is on the whole a very equivocal and doubtful case, from which different minds might well draw different conclusions. It is certainly a strong fact,—to show that the rector did not consider himself entitled to the great tithes at the time of the agreement,—that he did not make any mention of that right. The matter is nevertheless involved in great obscurity and intricacy; and though I have examined it with great care, I am not able to come to any decisive conclusion. The long acquiescence of the rector may also be considered as evidence of his not having any right, or at least, as proof of a consciousness that he had none; but, as it is a nice and difficult question, and as there is nothing to prove the right in the vicar, but that decree alone, I fear I should be doing wrong if I were not to send this to a further inquiry.

As to the small tithes, there must be a decree for an account.—On the question of the great

18 7.

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tithes there must be an issue, in which the vicar must be made plaintiff.

The consideration of costs to be *generally* reserved.

The KING v. GREGORY.

12th July.

Where a confirmed purchaser of premises under a decree of the Court, died before any conveyance had been made to him, having in the mean time devised his interest therein to trustees, the Court ordered that a conveyance should be made to them, without the consent of the testator's heir at law, he being an infant.

JOHN WOOD was the purchaser of premises, sold in the usual manner, under a decree in this cause.

He was confirmed the purchaser, and ordered to pay in his purchase-money, and to be let into possession; and under the orders in that behalf he paid in his money, and was let into possession.

He shortly afterwards died before any conveyance had been made to him, and devised these premises, and all his real estate, to certain persons upon trust.

The devisees had moved, that a conveyance might be made to them.

The Court then said that could not be done without the consent of the purchaser's heir at law.

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But being now informed that the heir was an infant, and therefore could not consent; and that the utmost inconvenience would arise from not allowing a conveyance to be made to the devisees in trust of the purchaser, the conveyance was

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The Court will not make an order that the witnesses of a defendant claiming goods seized by the customs, may be allowed to inspect them before the trial of the usual information *in rem*, on an affidavit of the party, that he believes he shall be able to prove by such witnesses, that the goods are not contraband, but were made in this country, and, for the most part, by the witnesses, who were required to be allowed to see them.

ADAM moved, pursuant to notice, that the witnesses of the defendants might be allowed, at proper times, and on reasonable notice, to inspect the goods, (a quantity of black silk and thread lace,) which had been seized by the Customs as smuggled, and appraised, for the condemnation of which the present information *in rem* had been filed.

The affidavit of one of the defendant's partners stated, that he believed he should be able to prove that none of the goods seized were contraband; and that a great part thereof was actually manufactured by persons in this country, whom it was the intention of the defendant and his partners to bring

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forward on the trial of the cause, to prove the manufacture thereof;—that the said witnesses were numerous; and that it was necessary that they should be allowed to inspect the said goods, to be prepared to give such evidence.

It was thereupon moved, that, as the witnesses alluded to in that affidavit not having seen the laces in question for a long time, whereby it became necessary that they should be allowed the opportunity sought to be given them by the present application, the Court would make an order for the purpose; but,

The Court having stated that this motion was quite novel, and that such applications had a tendency to embarrass the proceedings of those whose duty it was to protect the public revenue, and to throw difficulties in their way which they had not the means that private parties possessed of obviating, and that it would be, therefore, a dangerous precedent, refused the application.

Order refused *.

* Vide *Attorney-General* v. *Green*, ante, Vol. I. p. 130.

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A modus of 5*s.* for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, called renew cows, or cows having had each a calf within the year,—preceded by a modus of three halfpence for every cow called a renew cow, or a cow that has had a calf within the year and is full of milk,—in lieu of the tithe of the milk of such cow, cannot be supported on the ground of inconsistency.—WOOD, *B. dissentiente.*

THIS was a Bill filed by the vicar of *St. Lawrence without Walingate Bar* (*York*), for an account from the defendants (occupiers) of all the titheable matters, except corn, hay, hens and eggs, taken by them on their respective farms.

The latter standing alone, would also be objectionable, because it is not stated what is to be paid for the number of calves under five, or between ten and five.

One shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, rank.—It is also bad on the second objection taken to the preceding modus. By WOOD, *B. aliter.*

Three-pence for a lamb, or 2*s.* 6*d.* for every tenth lamb, in lieu of the tithe of such ten lambs, not so rank as to be decided on by the Court of Equity without an issue.—GRAHAM, *B. dubitante.*

One Shilling for every tenth pig, in lieu of the tithe of such ten pigs, rank, and not sufficiently particular as to intermediate numbers, and therefore bad.—WOOD, *B. contra.*

So as to geese.

A modus for tithes of articles of modern introduction, cannot be supported, because of the anachronism.

Eighteen-pence in lieu of tithe of rape-seed, when sold in the seed, is bad for uncertainty, and being capable of fraud.—WOOD, *B. dissentiente.*

The following moduses held good and issues decreed:

4*d.* for messuage and garth—2*d.* for every cottage and garth—1*d.* for every strip cow—4*d.* for every foal—2*s.* 6*d.* for every tenth lamb, in lieu of the tithe of such ten lambs.

As to all the other moduses, the usual account.

Costs to be taxed, and the consideration as to payment reserved.

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The grounds of the defence were as follow: 1st, That the plaintiff never resided in the parish. 2dly, the following moduses:

Fourpence for every messuage and garth.

Twopence for every cottage and garth.

A penny for every cow called a strip cow, or cow that has not had a calf within the year, and is old in milk, in lieu of the tithe of milk of such cow.

Three halfpence for every cow called a renew cow, or a cow that has had a calf within the year, and is full in milk, in lieu of the tithe of the milk of such cow.

Five shillings for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, and called renew cows, or cows having had each a calf within the year.

Two shillings and sixpence for every five calves, where there happens to be only five calves, in lieu of the tithe thereof, and also of the tithe-milk of the cows belonging to such calves, and called renew cows, or cows having each had a calf within the year; but for every calf under five the answer stated that no tithe was ever paid, or any thing in lieu of the tithe of every such calf, save as to the additional payment of fourpence-halfpenny, as hereinafter mentioned.

Fourpence

Fourpence for every foal, in lieu of the tithe thereof.

One shilling for every tenth fleece of wool, in lieu of the tithe of every such 10 fleeces of wool.

Two shillings and sixpence for every tenth lamb, in lieu of the tithe of every such ten lambs.

One shilling for every tenth pig, in lieu of the tithe of such ten pigs.

One shilling for every tenth goose, in lieu of the tithe of every such ten geese.

Five shillings for every acre of potatoes, in lieu of the tithe thereof.

Two shillings for every acre of turnips, when the same are eaten by the cattle of the person who grows the same, in lieu of the tithe thereof.

One shilling *and sixpence in the pound* in lieu of the tithe of *turnips,* when sold by the person who grows the same.

One shilling and sixpence in *the pound* in lieu of the *tithe of rape-seed,* when the same is sold in the seed.

Five shillings for every acre of line or linseed, in lieu of the tithe thereof; all of which become due and ought to be accepted, &c. on the 21st day of *December,* or on the last day of each year.

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The answer then stated, that such payments were all ancient and immemorial payments, and never had been raised, except about thirteen years ago, when an additional payment of fourpence-halfpenny for each calf under five calves was, on the request of the then tithe-gatherer, consented to by some persons, and had since been paid, but which, they insisted, ought not to destroy the said customary ancient payments. The payments were all proved, and non-perception of tithes in kind.

Martin, and *Roupell*, for the plaintiff, insisted on the following objections to the several moduses, or as pleaded, or as proved—that the modus for messuage should have stated the house to be ancient, and that that for the garth should have described its quantity or boundaries, otherwise it would be uncertain and indeterminate. To the modus of one penny for strip cow, and one penny-halfpenny for renew cow, they objected that they were badly laid, in not having stated expressly, when those moduses were respectively payable; for the moduses are all stated to be payable collectively, and in the aggregate, on the 21st of *December*, or at the end of the year; whereas many of the separate species of tithe is of right payable at the time of its production, as wool at shearing time, &c. and that it did not appear for what time the modus so laid was payable; and they cited *Goddard* v. *Keble* (a), and *Penrice* v. *Dugard* (b).

(a) Gw. 631. (b) Ib. 632.

To

To the moduses of five shillings for every ten calves, and two shillings and sixpence for every five, &c., they submitted, as insurmountable objections both in point of pleading and of substance, that they were badly laid, as having been stated to be payable for the milk of the cows belonging to them, and called renew cows; because by the modus immediately preceding, the milk of that species of cow is stated to be covered by that modus; that they were rank in amount, and that they were also bad on account of there being no consideration given to the clergyman as a commutation for the tithes of the calves under the number of five, or for those between five and ten; that the same objection also arose as to the manner of laying these moduses as had been taken to the former—there being no time stated as the period to which the moduses were applicable, so as to show the quantity of produce meant to be covered by the payment.

The several moduses of 1 *s.* for every 10th fleece of wool,—2 *s.* 6 *d.* for every 10th lamb,—1 *s.* for every 10th pig,—and 1 *s.* for every 10th goose, they contended, were palpably rank, and could not therefore be supported; and that they were also objectionable in not having accounted for any less number, to the tithe of which the vicar was as clearly entitled as to the tithe of the number stated.

To the modus of 5 *s.* an acre for potatoes, and 2 *s.* an acre for turnips, they objected the anachronism of prescribing an immemorial payment for articles of modern introduction in terms,—a payment which must have originated before the time of *Richard* the

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the first,—and that as a commutation for tithe of an article not known in this country till the reign of *Elizabeth*. They contended, besides, that if such a modus could be put on the record, the payment would be grossly rank; for 5*s*. an acre had been held rank, even for wheat. *Torriano* v. *Legge (c)*.

They insisted on similar objections to the moduses of 1*s*. 6*d*. in the pound for turnips sold by the grower, both that such a payment could not have had an immemorial origin, the pound not having been known in England as a measure of money till the reign of *Charles* the first;—that it was also rank, and was calculated to enable the occupier to defraud the clergyman; and they applied the same objections to the modus for rape, when sold in the seed; and to the modus of 5*s*. per acre for line or linseed.

Fonblanque, and *Trower*, for the defendants, contended, that it was not necessary that the house should be laid as ancient, or that the garth should be more particularly described. In Dr. *Grant*'s case *(d)* it was resolved, that a modus might be pleaded for houses for which tithes were due, and no objection was made as to their not having been laid to be ancient. So also in *Whitaker* v. *Leyfield (e)*, and *Leifield* v. *Tysdale (f)*, where the tithe for houses and buildings was accounted for on the principle of the former liability of the land on which they

(c) Gw. 909.
(d) 11 Co. 16, and Gw. 259. Hob. 10. Bunb. 108.
(e) Gw. 261. (f) Ib. 263.

were

were erected. The object of the defence is to put these admitted payments into such a form as that they may be submitted to a Jury to decide on them, and therefore, whenever fair doubts arise, the obvious course is the direction of an issue.

To the objection of rankness, they answered, that the particular mode in which all the payments were made, and the very consideration which had been adverted to as a further objection to them,—that where the numbers did not extend to a certain amount, nothing was to be paid for tithe,—furnished an argument against any objection on that ground. In *Gill* v. *Horrocks (g)*, a modus objected to on the hearing of the suit in equity, on the same ground, (because in laying the modus it was not said, and so in proportion for a greater or less quantity,) was sent to an issue, and established by a verdict; and the question, whether such an agreement was ever, in point of fact, made, is one which ought peculiarly to belong to the province of a Jury, when it arises in any case of singularity, or deviation from the usual customs by which money-payments become entitled to be considered as moduses. They cited, as to the amount of the lamb-modus, *Webb* v. *Gifford (h)*, *Green* v. *Askew (i)*, and *Bertie* v. *Beaumont (k)*.

As to the rankness objected to, 5*s.* an acre for tithe of line or linseed, it was admitted that there were no cases on that point; but it was urged that,

(*g*) Gw. 861.
(*h*) Ib. 708.
(*i*) *Ante*, Vol. II. 314.
(*k*) Ib. 303.

therefore,

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therefore, and in consequence of the prevailing want of knowledge of the value of such articles in the time of *Rich.* I. when it was probable that such things were of considerably greater proportional value than at present, the doubt should decide that the assistance of a jury was necessary, and therefore an issue ought to be directed.

They then defended the modus for potatoes and turnips, on the ground that, although historically they were reputed to be articles of modern introduction, yet in the case of *Boscawen* v. *Roberts* (*l*), the Court decided that they were a subject of modus.

To all the objections founded on the suggestion of the agreement being open to fraud, they submitted in answer, that that, even if it were well founded, would not be sufficient to deprive the occupier of the benefit of such an agreement; and that, although in the case of mills and agistment the same objection arose to money-payments in lieu of those tithes, that objection had never been allowed to prevail.

Martin, in reply, insisted on the rankness of all the money-payments set up; and, adverting to the case cited to establish the proposition, that a modus might be pleaded for potatoes, he denied that that case was law, and asserted that it was calculated merely to mislead, as the principle would not bear investigation or discussion.

(*l*) 3 Gw. 947.

He

He repeated, that the tendency to encourage fraud, inherent in the payment of so much in the pound for rape-seed, was an objection to that mode of paying the tithes which was sufficient to destroy it; and in the case of mills and agistment, he submitted that such a mode of rendering the tithe was adopted of necessity, and therefore the course had obtained in those instances where it could not be collected in any other manner, whereas rape is tithed in the field.

[RICHARDS, *Chief Baron.*—It has been held in the case of clover-seed, that it ought to be set out in the field *(m)*.]

With respect to linseed, it was observed, that that was a statutory payment, under the 11th and 12th Will. 3. ch. 16.

Cur. adv. vult.

The Court, not concurring on all the points, now delivered their several opinions *seriatim*.

WOOD, *Baron.*—In the case of *Layng* v. *Yarborough* and others, there being a difference of opinion in the Court, it falls to my lot to give my reasons first, my learned brother *Garrow* not being here when the cause was heard. This bill was filed by Mr. *Layng* as vicar of *St. Lawrence*, without *Walingate Bar*, within the liberties of the city of *York*; and it is to recover the tithes of a certain district of that parish, called the constablery of *St. Lawrence*, in the township of *Heslington*. The defendants

(m) Lloyd v. *Bentley*, 4 Gw. 1615.

say

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say they are not liable to pay any tithes in kind, because they have at all times paid moduses in lieu of tithes; and it is clear from the evidence which has been given in the cause, that no tithes in kind have ever been taken, but that certain pecuniary payments have at all times been made in lieu of tithes; and the questions will be, whether all, or any, and which, of the payments which have been so set up, are legal and valid moduses.

It was said that some of these moduses are rank, and that others are inconsistent with themselves. With respect to the general doctrine of rankness, I will not, on this day, when we are much hurried, enter into the reasonableness or validity of it. I have already given my opinion upon it very fully, in *Heaton* v. *Cook*, in *Wightwick*'s Reports; and therefore, with respect to that, I shall say nothing at present. Probably that matter will receive a further discussion in parliament, in the course of next session; and I hope something will be done to set us perfectly right on that subject. I have always thought, and always shall think, that the determination of moduses upon the idea of rankness is an usurpation upon the province of Juries, such as we are not warranted in, except in cases of very unreasonable payments. Modus is a question of fact, and the people of this country are entitled to have their cases tried according to law. That has always been my opinion; and, from the best investigation I have been able to give to the subject, I still retain it. However, I shall now confine myself to the consideration of the different moduses

moduses which have been set up, and to see whether we are not warranted in declaring all of them to be good upon the authorities we have upon the subject.

The first modus set up is fourpence for every messuage and garth; the objection made to that was, that the term "garth" is not sufficiently definite; and that it is not alleged of what particular quantity a garth consists. I understand from my brother *Graham*, that that is not disputed; but is conceded to be a good modus. It is a term very well known in the north of *England*, and it is mentioned in *Cunningham*, and all the Law Dictionaries, I believe, as a thing as well known as an orchard; and we have held, that a prescription for an orchard and garden is good in general; with respect therefore to a messuage and garth, or a cottage and garth, there is no objection to it.

The next modus is a penny for every strip cow, or a cow that has not had a calf within the year, and is old in milk, in lieu of the tithe of milk of such cow. There is no objection, I think, made by the Counsel to that, if it be well laid; but it is said that it is not, because it is not stated for what time the modus is payable (*a*). If it is meant by that, that no time is stated when the modus is to be paid, that is not the fact, because all the moduses are in general alleged to be payable on the 21st of December. With respect to the time they are to cover, it must be one year; therefore it is sufficiently certain that it is

(*a*) Held not a fatal objection in the case of *Gibb* v. *Goodman*, Bunb. 328. Gwil. 735.

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meant to cover the tithe of the strip cow for one year; and all the other moduses are stated to be payable on a precise day at the end of the year; therefore I conceive that generally to be a good modus.

Then the next is a penny-halfpenny for every cow called a renew cow, or a cow having had a calf within the year, and is full of milk, in lieu of the tithe of the milk of such cow. There is no objection to that, as I understand from the Counsel, if it had been well laid. They make the same objection to that as to the other; but, however, it appears to me, that that is clearly a good modus.

The next modus is five shillings for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cows belonging to such calves, and called renew cows, or cows having had each a calf within the year. There is another, which I will state at the same time, because they seem to be connected; two shillings and sixpence for every five calves, where there happen to be only five calves, in lieu of the tithe thereof, and also of the tithe-milk of the cows belonging to such calves, and called renew cows, or cows having had each a calf within the year; but for every calf under five no tithe was ever paid or demanded, or any thing in lieu thereof, except fourpence halfpenny as thereafter mentioned. This alludes to what is said afterwards in the answer, that about thirteen years ago fourpence-halfpenny for every calf was paid by some persons, as it is stated.

Now

Now the objections to these two moduses are, that there is no satisfaction for the tithe of any calves under ten, and above five; and no satisfaction for any calves under five; and they are also said to be inconsistent, because there has been already a modus of a penny-halfpenny laid as for the milk of every renew cow, and here the milk is repeated again as to the calves. Certainly these are not laid very correctly, nor technically; and it is very much to be lamented that in most of the answers we see, we can scarcely find one that states a modus with precision and legal certainty; however, if we can collect the true sense and meaning of it, it is then sufficient to send it to a Jury, provided the question of rankness does not interfere to prevent it.

Now let us see how far they are inconsistent. The inconsistency is said to be, if I understand it rightly, there being first a penny-halfpenny for the milk of every cow, and then a repetition of the milk of the cows belonging to the calves. Now I take the meaning of it to be this, that for every renew cow there is at any rate payable a penny-halfpenny to cover the milk, that is, to cover the milk in whatever shape it may be used. It is very clear that the milk of the cow may be used for suckling the calf, or for household purposes; and therefore at any rate the vicar is entitled to a penny-halfpenny for that; then the next is, the farmer is to pay for the calves, and the milk, as I understand it, which their calves have; it may be tautology, so far as respects that; but it is no inconsistency; for the first is, whatever milk you have,

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whether you use it for the calves or not: in lieu of milk you shall pay a penny-halfpenny for the cow; or if you use it to suckle the calves it shall be covered under the calf-modus; and I see no inconsistency in it, though perhaps it is not well expressed.

Then the next objection to it is, that there is no satisfaction for any calves above ten, nor for any calves above five, until you come to ten; I agree that that is so; but still I consider that it is a good modus. The modus is five shillings for every ten calves; it does not stop at the first ten calves, but for every ten calves; supposing there are a hundred calves, there are to be ten times five shillings paid; if it was to be only for the first ten calves, and to pay nothing more, it would be unreasonable, because they would then only pay one five shillings; but here the modus is, that they shall pay five shillings for every ten that they have.

Then for every five calves they are to pay half-a-crown, that is, for five, half-a-crown, and for ten, five shillings: this cannot be considered rank by any means; there have been many instances where moduses for calves of sixpence a calf have been held good. In *Pocock* v. *Coles*, in the year 1684, reported in 1st *Wood*'s Tithe Decrees, 336, it was sent to an issue, whether there was a modus of sixpence for a calf, in lieu of tithe, and there are many instances in the books. In the 1st *Wood*, 365, in the case of *Harding* v. *Golding* in 1696, there was eight-pence for the tithe of every calf, and it was held good; that would be six shillings and eight-pence for

for ten. In *Gibb* v. *Goodman (a)*, there were six shillings and eight-pence paid for every tenth calf; there was an objection taken to the rankness of it; but the Court would not have sent it to an issue if they had considered it rank; yet they did send it to an issue; and they said, that the jury might find whether it was payable for a greater or less number, in the proportion of six shillings and eight-pence, and if it were, it would be a good modus; but there being in that case a prescription for every tenth calf in lieu of all calves whatsoever, the Court thought it rank, because there was nothing payable for the intermediate calves. Still they said it might be made good, if the jury found a proportion payable, if there were less than ten; so that the objection of rankness to six shillings and eight-pence was not admitted in that case. They went on this, that it was a prescription for a certain sum in lieu of all tithes. In this case there is for every ten calves a modus of five shillings, and for every five calves a modus of half-a-crown.

Then the question is, whether it is not reasonable to suppose, that in consideration of a larger sum paid for a certain member, the farmer or owner of the calves might be excused from paying when it was under that number. In the case of *Mantell* v. *Paine*, in 1798, before Lord Chief Baron *Eyre*, reported in 4 *Gwillim*, 1504, it was held, that a custom to pay one pig where there were seven and under ten was good, although no satisfaction was to be made where the number was under seven;

(a) 2 Gwill. 735. Bunb. 328.

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is not that pretty much the same as this? They prescribe here to pay five shillings for every ten calves, and half-a-crown for every five there happen to be, that is, they pay nothing under five, but two shillings and sixpence for the five; then they pay nothing from five to ten, but for ten they pay five shillings, and nothing for a less number than five; therefore, there appears to me to be no objection to any of these moduses.

If we go farther back into more remote periods, we find in the case of *Reddington* v. *Nice* (*a*) (1716,) a modus of, for every sow and ten pigs, one pig; if but seven, the same; but if fewer than seven, they were to pay nothing for tithe; and that was held good, and no objection was taken to it. There was also in a case since, for every ten fleeces one, and for every seven fleeces one, and for fewer no tithe; so that there are many instances where paying more for a large number, nothing is paid for a less number; and therefore, it is not a *non decimando*, under that number, because the parson has more for the larger quantity.—For every five, as I understand it, this clergyman will have two shillings and sixpence, but nothing for a less number; I can see no objection to that; and it seems to be warranted by the authorities. I have already shown that it is warranted by the reasonableness of the case. Moduses are contracts which have run for a length of time; and why cannot we suppose that parties might make such a contract as that. If you consider this as a composition, it appears to have existed long; that there is nothing so unreasonable in it as

(*a*) 2 Wood, 62.

to

to lead to the conclusion that it could not have existed as a contract before legal memory, because it has in fact existed as a contract during living memory. Why cannot we suppose that a clergyman would stipulate, if you pay him half-a-crown when you have five, you shall pay for none less; there is nothing improper in that, and therefore I am of opinion that all these moduses as to the strip cow, the renew cow, and the tithe of calves, where ten or five, are perfectly consistent, and although they might have been laid plainer or clearer, that is the fair construction to be put upon them.

The next modus is fourpence for every foal; with respect to that, I do not find any objection, and I take it there can be no dispute that that is a good modus.

The next is one shilling for every tenth fleece, in lieu of the tithe of ten fleeces. Now, I cannot conceive any objection to that; the objection made is rankness; but I do not conceive how that can possibly be considered rank; for observe what the description is. It is not a shilling for every fleece. If it was a shilling for every fleece it would be rank, I agree: but attend to the terms: it is a commutation of the tithes for money;—for every tenth fleece you shall take one shilling in lieu of it. In lieu of what? not of all the tithe, but in lieu of that tenth fleece, or the ten fleeces. If the fleeces do not amount to ten, I admit the vicar may be entitled to some pecuniary compensation for the tithe, according to value, and that he may have by subdividing the modus; there may

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be a modus as to a part of a tithe, leaving the rest untouched. If this modus be divided into parts it would be one penny, and not quite a farthing a fleece more. I can never hold that to be rank. In *Boscawen* v. *Roberts*, (3 *Gwillim*, 946,) one penny for every fleece was held good, and decreed: and in another case three halfpence for every fleece has been held a good modus. Then this is a shilling, not for the tithe of every fleece, but it is a shilling for the tenth fleece, that is to say, when I am liable to pay you the tenth fleece, in lieu of that you shall take a shilling; there is nothing rank in that; and therefore from the manner in which the objection is made, I think it could not have been understood, because if it was a penny halfpenny for every fleece it would be good; then why cannot a shilling be good for every tenth? The parson will be entitled to his tithe in kind, (that is, the value of the tithe in kind,) for any number under ten, and when it amounts to ten he is to take a shilling instead of the tithe in kind.

Then the next modus is two shillings and sixpence for every tenth lamb, in lieu of the tithes of ten lambs; that is, on the same plan; it is, if a tenth lamb becomes due to you, you shall take two shillings and sixpence instead of it; that would be, if you divide it, and make it cover the whole, threepence a lamb. It is true, that in *Bishop* v. *Chichester*, Lord *Thurlow* said, that threepence for a lamb was notoriously rank; but was he warranted in that? most undoubtedly he was not: and it is merely a *dictum*. But how does this modus stand with

with respect to lambs? There have been larger moduses. In the first volume of *Wood*, 200 *(b)*, there is fourpence a lamb, in the year 1680; for this idea of rankness had never crept into the law at that time: I believe the objection originated in *Gifford* v. *Webb*, which went to the House of Lords. Again, in 1 *Wood*, 373, *Leach* v. *Deacon* & *Watts*, (1696,) there was for every lamb yeaned in the parish threepence, and held good. Then came the case of *Gifford* v. *Webb*, which was this:—it was decided first, by two Barons, that threepence for a lamb was good. There was a petition for a re-hearing: there was afterwards a re-hearing, and then all the Barons concurred in opinion that it was a good modus. The parson was dissatisfied, and he appealed to the House of Lords, who held it not rank; therefore what authority Lord *Thurlow* had for his *dictum* in *Bishop* v. *Chichester*, I cannot say; it was not founded in legal authority. Since that time this Court has considered rankness; and we, in the recent case of *Bertie* v. *Beaumont*, directed an issue to try whether threepence for a lamb was rank or not; so that I take for granted, upon that authority, that it cannot be disputed that threepence for a lamb, or (what is the same thing) a commutation of two shillings and sixpence for every tenth lamb, is good; therefore I conceive that modus to be valid.

The next modus is a shilling and a halfpenny for every tenth pig, in lieu of the tithe of such tenth pig: There is nothing said there also about

(b) *Hatcher* v. *Clewer*.

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the intermediate quantity: but this is only a commutation of money for the tithe in kind. And what objection can there be to that? There are many moduses as high as that: it would be a penny three farthings a pig, and if that meant the tithe of all pigs, that would be rank? and if that is not rank, then a shilling and a halfpenny for the tenth is not rank. It does not go in lieu of all tithes of pigs; but it is a commutation, that for every tenth pig due to you, you shall take one shilling and a halfpenny.

The next is a shilling for every tenth goose. That comes under the same observations as I have made as to the others:—Instead of taking the goose in kind, when there are ten you shall have one shilling in lieu of it. In the case just mentioned, of *Boscawen* v. *Roberts*, one penny-halfpenny for every goose was held a good modus: and that would amount to more than a shilling for the tenth goose.

The next is five shillings for every acre of potatoes. Certainly that cannot be sustained, because it is a prescription for potatoes by themselves; and potatoes are of modern introduction: there can be no doubt, therefore, that that certainly is bad.

The next is two shillings and sixpence for every acre of turnips; that is bad upon the same ground, because they are also of modern introduction, and there cannot be a modus for that which has been introduced within time of memory, if it be so expressly laid.

Then the next is eighteen pence in the pound in

in lieu of the tithe of rape-seed when the same is sold in the seed. I suppose the objection to that is, that a modus to pay so much in the pound is bad because it is liable to fraud. Now I find many instances where so much in the pound has been held to be good. In 1 *Wood*, 60, (*Holbech* v. *Taylor*,) two shillings for every pound rent of the lands agisted for tithes of herbage, was held to be good. In *Simpson* v. *Tucker*, in the same book, p. 197, twenty pence in the pound for agistment, according to the yearly rent, was held to be good. In *Ernste* and others v. *Watts*, 1 *Wood*, 304, (1692,) for such apples and pears as the parishioner gathered and sold, the tenth part of the money for which he sold the same: that was established as a good modus. In 1 *Wood*, 373, *an.* 1696, (*Leash* v. *Deacon* and *Watts*,) the tenth of what the calf sells for, or, if killed by the owner, the right shoulder; also the tenth penny for which honey sold within the parish, was held to be good. In the same book, 485, *Hockmore* v. *Richards*, a penny for every calf fallen and reared; and also the tenth part of the price for which every calf fallen therein has been sold by such owner or occupier, was established; and in the case of *Leathes* v. *Newitt*, yesterday, we sent a modus to trial, of the tenth of what the calf sold for. Now here, I conceive, is abundant authority to show that a tenth part of the rent, or a tenth part of what the thing is sold for, is good. I am aware of the case of *Startup* v. *Dodderidge*, in 1705, where two shillings in the pound, according to the true improved yearly rent or value of all the land in the parish, in lieu of all tithes, was held bad, principally on the ground of

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of liability to fraud, and yet I do not find that rule has been applied to a modus for any other subject of tithe; and it is remarkable that it was in the year 1705 when *Startup* v. *Dodderidge* was decided; and yet in the next year, 1706, the Court of Exchequer, in *Hockmore* v. *Richards*, determined the tenth part of the price for which a calf sold to be good: therefore I think I am warranted in saying that this modus is also good.

The last is five shillings for every acre of line or linseed, in lieu of the tithe thereof: this, though called a modus improperly, is a statutable payment given by the 11 and 12 *William* III. cap. 16, and the vicar cannot take more.

Upon the whole, I think all the moduses good, and that they ought to be sent to be tried, with the exception of those which I have mentioned; viz. for potatoes, turnips, and line or linseed.

GRAHAM, *Baron*.—I have the misfortune to differ from my learned brother *Wood*, with respect to several of these moduses, as indeed I am often obliged to do; but I have some satisfaction in finding that I generally concur with the majority of the Court; and I cannot but express the little surprize I feel in differing on this occasion, because the view which he has taken of the consideration of these moduses does not fall in with the general impression I have picked up by looking at the authorities, not of one Judge, but established by the decisions of the majority of the Judges, in the various cases which I have felt it my duty to study.

Now

Now there are several of these moduses that I do not mean to dispute at all, and which, as they stand at present, may fairly undergo further inquiry. With respect to fourpence for every cottage and garth, I think that that term is sufficiently understood in many parts of the kingdom, to admit of a ready application of any pecuniary payment to it, as a subject of modus. So twopence for every cottage and garth, in lieu of the tithes thereof, there is no objection to that; and as it appears to me, there is no objection, upon the evidence, to the third modus, of a penny for every cow called a strip cow, or a cow which has not had a calf within the year, and is old in milk, in lieu of the tithes of milk of such cow; but with respect to the three succeeding moduses, they seem to be so confounded, so inexplicable, and so perfectly unintelligible, that after the utmost labour and ingenuity which I can bestow upon them, I am prepared to say that not one of them can stand, and it will be necessary for me to state my reasons very particularly.

The first modus to which I object, as involving (when taken with that which follows) one confused notion of a modus founded on several payments, is that of the penny halfpenny for every cow called a renew cow, or a cow having had a calf within the year, and is old in milk, in lieu of the tithes of milk of such cow. Now this modus, taken by itself, stands simple and absolute; and any person looking at it would necessarily understand that it was a penny halfpenny payable for every individual cow, (be their numbers what they may,) which should answer the description

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description of a renew cow, in lieu of the tithe of its milk, and so it might stand without any qualification whatever. But mark the qualification that is necessarily introduced by the succeeding modus, not taking them by themselves. That cannot be true according to the very next modus; for a renew cow does not pay a penny halfpenny for every calf, if the next modus exists; but for every ten calves, when there happen to be ten, five shillings instead of a penny halfpenny are to be paid in lieu of the tithe of such calves, and also of the tithe of the milk of the cows belonging to such calves, and called renew cows. How can that consist? The first proposition was, that the renew cow paid only a penny halfpenny for milk; then they say the renew cow does not pay a penny halfpenny for the milk, but the modus dances, shifts, and leaps from the simple subject of the milk, and is confounded with the two other subjects; and by a most unaccountable effect, that cow, which in respect of its milk pays only a penny halfpenny when she has ten calves, pays five shillings in lieu of the penny halfpenny; and so when there are five calves, two shillings and sixpence is to be paid in lieu of that one penny halfpenny. Now my first objection to this is, if you state the first modus of a penny halfpenny for the milk of the renew cow, you should state it to be payable for the milk, *except* where there were ten cows and ten calves, or five cows and five calves, and then that they do not pay a penny halfpenny, but five shillings, and two shillings and sixpence, in respect of the milk and calves. That would be the proposition, if any thing; but that is not so stated; and therefore it

it seems to me, that at any rate the modus of a penny halfpenny for a cow cannot stand, because it is not stated to be modified by those qualifications.

With respect to the moduses themselves of five shillings for ten calves, and two shillings and sixpence when there happen to be only five calves, it appears to me that they are perfectly objectionable from the circumstance, that nothing is said as to what is to be paid for the calves up to five, or from five to ten, or for the calves from ten upwards to any quantity; because, unfortunately, from the manner in which the moduses are laid, that construction which a jury might put on it, as my learned brother suggests, is excluded by the very terms of it; for those moduses are expressly stated to be paid only when there are ten or five calves; and it would be monstrous if we were to be called on, in every instance, to help a defendant out in making good these payments, and tell him, instead of saying that the five shillings and the two shillings and sixpence are to be paid for the calf and milk, when ten or five, you mean, in that proportion till they come to five, and in that proportion till they come to ten, and as they amount to fifteen, twenty, and twenty-five, and so on; but that is not only not stated, but the conjecture of it is precluded by the manner in which they have in fact stated their proposition, that it is paid in those two instances only; therefore it really seems to me that these three moduses are perfectly inconsistent and bad. Whatever loose ideas may possibly be gathered from the fact of some pecuniary payments having been made, it seems impossible to pick out from them what

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what those distinct customs are upon which the defendants mean to stand. Besides, is it possible not to see, that the expression of five shillings for every ten calves savours so strongly of modern times that one can hardly doubt about it; five shillings has evidently the strongest appearance, in my apprehension, of one of those modern payments which ecclesiastical people make with their parishioners, by way of temporary composition. But, I repeat, that from the observations I have made, I have satisfied my mind, and I hope those who hear me, that it is impossible to pick out any distinct custom to bar the plaintiff; for with respect to these moduses, some of them are perfectly unintelligible taken together, and the others of them are equally unintelligible taken individually.

The next modus of fourpence for a foal I see no reason to find fault with.

With respect to the modus of one shilling for every tenth fleece, I will venture to say, though I have not much skill in agriculture, that, in many parts of England, a person would be glad to take a shilling for every tenth fleece, *at this day*, including lambs and all; and it is utterly inconsistent with all historical knowledge that one shilling should be paid for the fleece of any animal; long subsequent to legal memory, that was more than the price of a sheep. One shilling for a fleece, therefore, is rank on the face of it.

A notion has gone abroad, as if the term rankness was of novel introduction; I have taken the same pains

pains as my learned brother, in the case of *Heaton* v. *Cook*, to which he has alluded, to show that that is a mistake. That the grossness of the price has always been a subject of consideration for the Court in moduses, even those most zealously attached to the jurisdiction of a jury, (and none are more so than I am, where the Court cannot form an opinion of its own,) must admit; and though the constant practice has been to send it to a jury in cases of doubt, the grossness of value is, in the first instance, to be taken into consideration here.

Now, in order to fortify myself in the opinion of its rankness, I would refer to the case of *Torriano* v. *Legge*, (Rayner, 521,) where a penny for every fleece was held bad. But there is another objection which goes to the very root of the thing, that it is ridiculous in the manner in which they state it, that there is a shilling for every tenth fleece; for nothing is to be paid up to ten, or from ten to twenty. It is defectively and inconsistently laid, because it gives the parson nothing for the intermediate fleeces; and if the farmer has, for years together, nine sheep, he pays nothing, which cannot be; therefore, I think, that on both these grounds, it is bad.

Then we come to the modus of two shillings and sixpence for every tenth lamb, in lieu of the tithe of such lambs; with respect to which, whether it is to be decided by the Court now, or by a jury, I throw myself upon the opinion of my Lord Chief Baron, and my brother *Wood*. I do not insist upon that, though

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I am of opinion that it is palpably gross in itself. We know that up to the period of *Gifford* v. *Webb*, in two or three instances, the Court had no hesitation in saying that three pence for each lamb was gross. In *Gifford* v. *Webb*, the Barons, as has been truly stated by my learned brother, were of a different opinion, and the House of Lords confirmed their opinion, and sent it to an issue there. My learned brother will, however, forgive me for not agreeing with him, in attempting to impeach that decision of Lord *Thurlow*, or in treating his solemn opinion, in his situation of Lord Chancellor, with the same respect as an authority, as we treat the opinion of one of the four Judges of the Court of Exchequer. It is a little derogating from his authority not to give him the same degree of credit as one judge has with us; but Lord *Thurlow*'s authority on that subject was not to be despised, for it was one on which he had thought very much, and he was clearly of opinion that two shillings and sixpence for a lamb was ridiculous; he would not hear of it, and he actually refused to send it to an issue; and not one of the numerous counsel who there attended ever disputed it, but gave it up. Out of respect, however, to that decision in the House of Lords, we, in the case of *Askew* v. *Greenhow*, sent an issue to try the question; and a very learned brother of ours on that occasion, when he came to lay the question before the jury, told them very roundly, that they could not doubt of it; that it was impossible, consistently with historical knowledge; and the jury found accordingly, that it was rank, and the modus was set aside. An application was made for a new trial,

trial, and it was said that the judge had run away with the jury; because he had told them his opinion, and they had found accordingly; but we thought that no reason for granting a new trial; and certainly if the question of fact is left to the jury, whether a lamb would sell for that price at the time to which we refer, it is an absurdity that common sense will not admit of. Thus the matter was disposed of; yet we are now required to grant another issue on the subject. If this view of the case does not make a proper impression, let it go to an issue, and the result must be the same; I have a great idea of the integrity of juries, though I know they may on some occasions be biassed.

The next is a shilling for every tenth pig, without saying what is to be paid for a less or greater number; but I, proceeding on the idea which I have thrown out on the former part of the subject, should have no difficulty in supposing that a sucking pig was not worth a shilling, because the tithe pig is to be paid when the pig is at the dug; the farmer is not to keep it till it is a grown pig, the parson must take it in five or six weeks; now what can be said of one pig in a farrow being worth a shilling, at a time when the pig itself, and all the pigs in the stye, perhaps, would not have been worth so much. Then the question of rankness being discussed, another objection is, that nothing is stated to be payable for the numbers above or below ten.

The same as to geese; it is only one shilling for every tenth goose, that is more than a penny for

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the tithe of a goose; I think that also is too gross in point of amount, and besides it is not stated what is to be paid for the intermediate numbers.

As to the potatoes and turnips, I will not take up the time of the Court with discussing the validity of that payment.

With respect to one shilling and sixpence in lieu of the tithe of rape-seed, when the same is sold in the seed, the cases which have been referred to may throw some degree of doubt on my opinion; but fortified by *Startup* v. *Dodderidge*, it is impossible to consider that a valid modus, both from the uncertainty of it, and the opportunity it furnishes to defraud. It is true, in a late case, that circumstance was not adverted to; we seemed to think a qualification of paying so much of the price when sold might be good, though I do not think that expressed the value; but whether we did or did not then advert to that, this stands on its own ground; if it happens not to be sold, there is nothing to be paid; for it is to pay one shilling and sixpence in the pound, in lieu of the tithe of rape-seed when sold. My objection to that accords with what was said in *Startup* v. *Dodderidge*, where so much out of the rent was held to be liable to error, that it was impossible to know what was the rent; or whether or not a fine had been taken to reduce the rent; so that by those means the clergyman might be put to difficulties to know his right; and on a motion for a prohibition, the Court were of opinion, that was of itself a bad modus, as being liable to fraud upon the parson. I do not know how

how we can say that a man is to have one shilling and sixpence in the pound in lieu of rape-seed; how is he to ascertain the value of it; I know no way but trusting to the man who sold it, and if he gives him a false statement of the price, he can only be detected by going about to all the persons to whom it was sold; and suppose they colluded, and the purchaser was directed to say it was sold to him for so much only, when he agreed to give the seller so much more, how is that to be discovered? It is leading the parson, whom it is the object of the legislature to place in security as to his rights, into a state of uncertainty, and to leave him at the mercy of the person who is to pay the tithes, which the law did not intend; and therefore I think that these moduses are bad.

RICHARDS, *Chief Baron.*—I shall occupy but a very small portion of time, for the case has been so fully discussed by my learned brother Graham, that I should be inexcusable if I wasted any of that time which is so valuable on this day. I agree in general with my brother *Graham*; and for the reasons which he has stated, except as to the modus covering the lamb; though I concur with him in the reasons which he has given: and I should be of opinion with him entirely, if there had been no issues sent by this Court after the case tried before Lord *Manners*. But I understand that there has been a subsequent case in this Court, in which an issue was directed to inquire as to the validity of

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three pence for a lamb (*n*), and that being the case I do not feel myself at liberty to say that this is a rank modus. My Lord *Manners* certainly did direct the jury as has been stated, and the Court here most assuredly confirmed his direction; and I should have considered it as a determination of the Court with respect to the invalidity of that modus, if the Court had not subsequently entertained a doubt upon the subject, as they must have done when they sent an issue on the same point; and therefore I must differ from my brother *Graham* on that part of the case.

With respect to the rape-seed, I do not exactly concur with my brother *Graham* in the reasons which have satisfied him; but I need not say that I venture to differ from him upon that subject, because it seems to me that there is another conclusive objection here. The modus is for so much of the value of the rape-seed when sold. But when is it to be sold? That is not stated. Suppose it is not sold. Suppose it is kept till the end of the year. How is the vicar to know when the tithe is to be paid? Adding that circumstance to the objections stated by my brother *Graham*, I am of opinion with him on that part of the case.

With respect to the general question, whether this Court has a jurisdiction and a duty to decide against moduses, if they find that the fact is not

(*n*) *Bertie* v. *Beaumont*, ante, vol. ii. p. 303.

proved

proved satisfactorily in favour of a prescription, I shall only say a very few words. Whatever the law ought to be, whatever the law may be expected to be, I take it we are here bound by our oaths to decide according to the law as we find it; I have found it to be the law of *England*, as it now stands, and I shall abide by it until the legislature orders the contrary. But that, as the law now stands, a Court of equity should decide upon facts as well as upon law, if they have sufficient evidence of the facts to satisfy their minds, the experience of every day proves: and it is nothing to say, that the question of modus is a question of fact, because if it be a question of fact, we are alike bound to decide it, if the evidence is sufficient to enable us to do so. It is like every other fact, and what is called rankness is only matter of evidence; if I see and am satisfied that there is not sufficient evidence to prove the fact of modus alleged by the answer, I am bound to decide against that modus as much as I am bound to decide upon any fact that I see in a cause. If I see the evidence in support of it unsatisfactory, I am bound to decide against it. If I find a modus laid inaccurately, I am also bound to decide against it; thus if I find a modus alleged of a shilling, for that which in the times to which we must refer, according to all the knowledge we have, would not be worth more than a penny, I am bound by my oath to decide that that is a payment of modern usage and not a modus; therefore on all these occasions, as the law stands, the Court is bound to inquire. I have inquired

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myself, as well as I have been able, in the course of this cause, as I hope I shall on every other, and I am perfectly satisfied with the decision my brother *Graham* proposes, except with respect to the lamb.

Decree:—An account as prayed,—except as to the titheable matters, for which the following moduses were set up, of 4 *d.* for every messuage and garth,—2 *d.* for every cottage and garth,—1 *d.* for every strip cow,—4 *d.* for every foal, and 2 *s.* 6 *d.* for every tenth lamb: and as to those payments, the plaintiff having declined to accept issues, the bill to be dismissed, with costs.

END OF THE SITTINGS AFTER TRINITY TERM.

APPENDIX.

The following are the Cases referred to in the cause of LEONARD *v.* FRANKLIN*, p. 264, on the question of the admissibility of the book produced from the registry of *Lincoln*.

HALSE *v.* EYSTON.

1810. 10th Nov.

THE plaintiff, who was vicar of the parish of *Welford, in the county of Northampton*, claimed all small tithes by virtue of *some ancient endowment, custom or usage*, and amongst others, to all the tithes within that part of the parish called the Old Inclosure.

The answer *admitted the vicar's title* to tithe throughout the parish, except as to such parts as were covered by a modus of 17*l.* 6*s.* 8*d.* set up for the lands in the parish called the Old Inclosure, in lieu of all the small tithes; and as to the lands forming what was called the New Inclosure, the defendants claimed an exemption under an award under an Inclosure Act of the 17 *Geo.* III.

* The book having been admitted in that case entirely on the authority of the precedents, it was thought necessary to investigate them, and it has been found that where the book was received, no objection had been taken to it, but in the case of *Harwood (Harward)* v. *Sims* referred to, it appears to have been objected to, discussed, and ultimately rejected.

1810. 10th Nov.

The sole question in the cause was, the validity of the modus set up, and the Solicitor General contended for the plaintiff, that the payment of 17*l.* 6*s.* 8*d.* was a comparatively modern composition merely, and not a modus; and amongst other evidence brought forward at the hearing, in support of the plaintiff's case, the transcript of the original endowment of the vicarage *, as taken from the book in question, and which was read, to shew that the payment set up as a modus could not be so considered by the Court, by reason of its exceeding in the value the amount of the tithes of the whole vicarage at the time of its endowment, which was itself within legal memory, whereby it would appear that the amount in value of the vicar's tithes was 5*l.* 6*s.* 8*d.* which after deducting what was reserved to the Abbot and Convent, was further reduced to 3*l.* 6*s.* 8*d.* The Nonæ Rolls, 15 *Edw.* III.—The ecclesiastical survey, 36 *Hen.* VIII. valued the vicarage at 10*l.* 3*s.* *communibus annis, pensio*

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* In an ancient book of endowments of vicarages in the time of Bishop *Walls*, who began to preside over the see of *Lincoln* in the year 1209, and which book is remaining in the registry of the Lord Bishop of *Lincoln*.

Norhampton.

Welleford.

Vicar in Ecca de Welleford que est Abbis & 9 de Saleby an 9 ordin consistit in toto Altag dco Eccli cum minutis decimis que valet viij N B Salvis Abbi & 9 ventui iij N B Annuis de eade de oneribus nihil est ordinatum.

(A true Copy),
*John Fardell,**
Dep^r Register.

* Who was personally in attendance to prove the extract.

40 *s.* leaving 8 *l.* 3 *s.*—The parliamentary survey made it 35 *l.*—Pope Nicholas's taxation had it, "Church of *Welford*, 10 *l.* 13 *s.* 4 *d.* pension to the Abbot of *Suleby* 2 *l.*" 1810. 10th Nov.

For the plaintiff it was contended, that the documentary evidence was decisive against the fact of the payment being a modus, and particularly that of the book from the registry of *Lincoln*.

The counsel for the defendants* admitted, that they could not dispute the admissibility of *the book* as evidence, but they insisted that neither that nor any of the other ancient documents were conclusive against the parol testimony of long continued payment, and therefore pressed for an issue, because the vicarage might in point of fact be worth more than their valuation according to the documents.

[In the course of the argument, the Lord Chief Baron observed, that the great question in the cause was the effect of the evidence offered, as to whether tithes had been rendered in kind within time of memory; and his Lordship intimated, that the phrase "*minutæ decimæ*," used in the ancient documents, was strongly against the existence of a customary payment; and *Thomson*, Baron, added, that where the value of *the tithes* is given in such documents, *it implies a taking in kind.*]

* *Hollist*, and ——— for some of them; and *Dauncey*, and *Wingfield*, for others.

1810.
22d Nov.

The book of extracts of endowments, *tempore* Archbishop *Wells*, alluded to in *Leonard* v. *Franklin*, (*ante*, page 265) received in evidence.

The defence of a vicarage having been dissolved by a papal bull, and re-annexed to the rectory, unavailable against such other evidence as was produced in this cause.

HEBDEN v. FREEMAN and others.

(Extract from the Decree.)

THE plaintiff, who was vicar of *Norton*, in the county of *Salop*, filed his bill against the defendants, for an account of the small tithes on all titheable matters arising within the ancient inclosures of the said parish, and of corn arising on a farm called *Sapsons* or *Sampsons*, in *Muscott*, within the said parish.

Some of the defendants, by their answer, said, that they did not believe that by ancient endowment, prescription, or usage, the vicar for the time being, from time whereof the memory of man was not to the contrary, or for a great number of years last past, was lawfully entitled to have and receive for his own use, all small tithes from time to time arising, growing, increasing and renewing, within the ancient inclosures of the said vicarage and parish, and the titheable places thereof, and to the tithes of corn arising, growing and renewing on a certain farm called *Sapson* or *Sampson*, in *Muscott*, within the said parish. *But the defendants believed, that in an ancient book remaining in the registry of the Lord Bishop of Lincoln, there was an entry respecting the endowment of the said vicarage of Norton aforesaid, in nearly the words and characters, and to the effect, or nearly to the effect in the bill set forth:—said, they apprehended that the said entry was not, nor did contain the endowment of the said vicarage, but was only an entry of the purport or part of the purport of such endowment, and believed that search had been made for the original endowment itself, but that the same had not been found:—that they, from the said entry, believed that the vicarage of Norton aforesaid was, in or before the year* 1209, *endowed of all the altarage with the minute tithes to the* church of *Norton by Daventry* aforesaid belonging, and of the tithes of *Garb*, of the fee of *Sapson* or *Sampson*, in *Muscott*, and of the tithes of *Garb*,

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Garb, of *Ivoo*, of *Waleron*, in *Northampton*; and apprehended, that from that time until the year 1451 the vicar of the said parish was entitled to the tithes of which he was endowed as aforesaid; but believed, and hoped to be able to prove, that in the year 1451 the said vicarage was, at the petition of the prior and convent of the monastery or priory of *Daventry*, in the county of *Northampton* (to whom in and before the said year 1209, and afterwards, until the dissolution of the said priory, the rectory or church of *Norton* aforesaid stood and was appropriate,) and on the petition of his late majesty king *Henry* the VIth, dissolved by the then Pope *Nicholas* the Vth, by his bull, on account of the poverty of the said priory, and was appropriated to the said priory; and by which bull the said pope ordained, that whenever the said church or vicarage should become void for the future, the said church or vicarage should not be governed by perpetual vicars, but by monks of the priory or secular priests, to be instituted and removed at the will of the said prior, and without the licence of the ordinary or the king, or to that effect; and that afterwards, and until the dissolution of the said priory, which happened in or about the 16th year of the reign of his late majesty king *Henry* the VIIIth, by means of a bull of the then pope, namely Pope *Clement* the VIIth, the church of *Norton* aforesaid was served by monks belonging to the said priory, or other persons appointed for the purpose by the prior of the said priory, and at his will; and defendants insisted, that by means of the said bull of the said Pope *Nicholas* the Vth, the said vicarage was dissolved or destroyed as a perpetual vicarage, and the said endowment was determined, and the tithes with which the said vicarage was endowed as aforesaid, were restored and re-appropriated to the rectory of the church of *Norton* aforesaid:—believed and hoped to be able to prove that the rectory and advowson of the said church

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church of *Norton*, and various other possessions of the said prior and convent, which belonged to them at the time of their dissolution, and were in and about the 17th year of the reign of his said late Majesty king *Henry* the Eighth, granted and confirmed to the college called king *Henry* the Eighth's college, in the University of *Oxford*; and that they afterwards, and while they held and enjoyed the said rectory, had the church of *Norton* served, and the duties thereof performed, by their own priests or curates, to whom they allowed a pension or stipend for their services; and that they having, in the 37th year of the reign of his said late Majesty king *Henry* the Eighth, surrendered the said rectory and advowson to his said Majesty, his heirs and successors, and the same being in the possession of the crown, his late Majesty king *James* the First, in the 6th year of his reign, granted the said rectory and the right of presentation to the said vicarage, with various other hereditaments, unto *Francis Phillips* and *Richard Moore*, Esquires, their heirs or assigns, from or under whom —— *Britton*, Esquire, in or about the 12th year of the reign of his said late Majesty king *James*, and before the 15th year of the same reign, became by grant or other lawful conveyance seised in fee simple of the said rectory and advowson or right of presentation:—believed, that although the said —— *Britton* was as aforesaid seised of or entitled to the said advowson or right of presentation (in case he thought proper to present a vicar), his said late Majesty king *James* the First, in the 15th year of his reign, granted a presentation to the said vicarage to *William Ward*, clerk; and the said *William Ward* having, under an assertion or claim of right to tithes as vicar of the said parish, taken a lamb, the property of the said —— *Britton*, as tithe due to him as vicar, the said —— *Britton* brought an action of trover and conversion against the said *William Ward*, in his Majesty's Court of King's Bench, for the said lamb, and for

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for another lamb supposed to have been taken by the said *William Ward*, on the trial of which action, a special verdict was found, and that after four several arguments in the said Court, judgment was in Trinity Term, in the 16th year of the reign of his said late Majesty king *James*, given for the said —— *Britton*, on the ground that the said vicarage was dissolved by the said bull of Pope *Nicholas* the Fifth, and although such judgment was reversed in the Exchequer Chamber on a writ of error, yet that such reversal was founded on an error in the entry of the judgment, and not on the point of law, as by the records of the said judgments, to which defendants referred, would appear :*—believed, that although the said vicarage of *Norton*, as a perpetual and endowed vicarage, was dissolved as aforesaid, yet that after the said *William Ward* ceased to be vicar thereof, different persons were and had been at different times presented to the vicarage of the said church of *Norton*, by some of the descendants or family of the said —— *Britton*, or some person claiming under him (but whether regularly, defendants were not informed):—and believed, that plaintiff was in or about the year 1800, in like manner and on the like principle, presented and instituted to and inducted into the said vicarage and parish church of *Norton by Daventry*, but deprived of its endowment as aforesaid; and had ever since been and under such presentation vicar of the said parish; but defendants denied, for the reasons herein mentioned, that said plaintiff had ever since

* The Court had at first held, that as the Pope had at that time lawful jurisdiction in this country, the vicarage was well dissolved by the bull; but it appears by the records of the subsequent proceedings which took place between the same parties in this Court, and which are referred to in page 428, that *Ward*, the vicar, ultimately succeeded in establishing his claim.

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been or was well and lawfully entitled to have, take and receive the small tithes of all the titheable matters and things arising, growing, increasing and renewing within the ancient inclosures of the vicarage and parish church of *Norton by Daventry* aforesaid, or the titheable places thereof, or the tithes of corn of the farm called *Sapson* or *Sampson*, in *Muscott*, in the said parish; but defendants believed that, notwithstanding the said want of title in said plaintiff and his predecessors, appointed vicars as aforesaid, to tithes within the said parish, they had been in the habit of receiving from occupiers of some lands in the said parish (but of no lands within the hamlet of *Muscott*) payments for or in lieu of small tithes or some kinds of small tithes. The other defendants answered to nearly the same effect.

The plaintiff replied, and the defendants rejoined, and the cause was thereby put at issue; but no witnesses were examined under any interrogatories exhibited for that purpose. The cause came on to be heard in the Exchequer Chamber at *Westminster*, on the 19th day of *November* instant, (1810), when, upon opening the matter of the plaintiff's bill by Mr. *Cooke*, as counsel for the said plaintiff, the answers of the defendants by Mr. *Winthrop*, their counsel, and upon hearing Sir *Thomas Plumer*, knt. His Majesty's Solicitor General, on behalf of the said plaintiff; and on reading an order made in this cause, bearing date the 15th day of *November* instant, for leave to prove exhibits *viva voce* at the hearing of this cause, and on reading the following exhibits, to wit, *an ancient book of endowments of vicarages in the time of Bishop Wells, in the year* 1209, *brought from the registry of the Bishop of Lincoln, by Mr. Fardell, the Bishop's register there*; an office copy or extract of Pope *Nicholas*'s taxation of the vicarage of *Norton*; an office copy of the Nonæ rolls as to the church of *Norton* and *Throp*, with the vicarage, 14th *Edw.* III.

Edw. III.; office copy of the ecclesiastical survey as to the rectory and vicarage of *Norton next Daventre*, dated 26th *Hen.* VIII.; an office copy of the taxation of the vicarage of *Norton next Daventre*, from the book in the First Fruits office; an office copy of an enrolment of indenture of bargain and sale, 8th *James* I., *Phillips* and *Moore* to *Knightley*; an office copy of institution act of *William Ward*, clerk, to the perpetual vicarage of *Norton next Daventre*, dated 9th *October* 1615; an office copy of institution of *Joseph Barnard*, clerk, to same vicarage, 11th *November* 1642; office copies of several orders and decrees made in this court in certain causes and proceedings between *William Ward*, clerk, vicar of *Norton*, and *Nicholas Bretton* and others, defendants, bearing date respectively 10th *November*, in the 15th year of king *James*; 30th *January*, in the 18th; 13th *February*, in the 19th; 11th *May*, in the 19th; 11th *February*, in the 20th; 25th *January*, in the 21st; the 30th *November*, and the 11th *February* in the 22d years of the same king; the 6th day of *July*, in the 1st year of king *Charles* I.; the last day of *January*, in the same year; the 22d day of *January*, in the 6th; the 10th day of *February*, in the 7th; the 18th *November* in the 10th; the 17th *April*, in the 11th; the 5th day of *June*, the 30th *June*, the 9th *February*, and the 19th *November*, in the 17th years of the same king; the official copies of four terriers brought from the Registrar's office at *Peterborough*, dated respectively 19th *July* 1723, 12th *August* 1726, 21st *October* 1749, and 19th *July* 1758; an act of parliament, passed in 1755, touching the inclosure of *Norton*; office copies of an issue and record in the court of Common Pleas at *Westminster*, between *Nicholas Breton*, Esq. plaintiff, and *William Ward*, clerk, defendant; office copy of the parliamentary survey in the Archbishop's library at Lambeth, 22d *Jan.* 1655; office copy decree in this Court, in a cause wherein *Richard Bowles*, clerk, vicar of *Norton*, bearing

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ing date the 25th day of *Nov.* 21st *Charles* II.; and an agreement signed by the solicitors in this cause as to certain admissions, which were as follows:

"That the plaintiff might be at liberty to produce the office copy of entry from an ancient book *tempore* Bishop *Wells*, who presided in 1209, from the Bishop of *Lincoln*'s registry, purporting to be an entry of an endowment of the vicarage of *Norton*, but subject to the same objections that the defendants would be entitled to make to the original book if actually produced:

"That the plaintiff was duly instituted and inducted into the vicarage of *Norton*, in question in this cause, so as that the defendants are not to be precluded by such admission from controverting whether *Norton* is a vicarage or not, or if a vicarage, whether it is now endowed (if endowed at all) with any of the tithes demanded by the bill, and that notices to set out tithe were given to defendants in due time before filing bill:

"That the plaintiff might be at liberty to read in evidence the printed copy of the *Norton* Inclosure Act, of the 28th *George* II. and also office copies of the several institutions and presentments from the Register of *Peterborough* of the vicars of *Norton*, namely the presentments of Mr. *Joseph Bernard* in 1642; of Mr. *Samuel Withers* in 1690; of Mr. *Thomas Henchman* in 1701; of Mr. *Benjamin Francis* in 1706; of Mr. *Thomas Duncombe* in 1729; of Mr. *Thomas Phil. Shepperd*, in 1746; and of Mr. *Thomas Phil. Shepperd*, in 1754; or any other office copies of presentations or institutions to the said vicarage, subject to the like reservations as before, whether *Norton* is a vicarage endowed or not; and also office copies of the terriers of *Norton*, made in the years 1723, 1626, 1749, 1758, and 1801, subject to all legal exceptions that might be made to the original terriers if produced:

"That

"That the lands in defendants occupation are in the hamlet of *Muscote*, in the parish of *Norton*, and no part in the hamlet of *Thrupp*:" 1810. 22d Nov.

And that no tithes in kind for lands in the hamlet of *Muscote*, have been rendered to the vicar of *Norton*, in the memory of any person now living.

The further hearing of the cause was adjourned until this day (22d *Nov.* 1810), when, upon hearing, *Dauncey* and *Cooke*, for the plaintiff, *Hollist*, *Leach* and *Winthrop*, for the defendants, and His Majesty's Solicitor General for the plaintiff, in reply, it was ordered, that it be referred to the Deputy Remembrancer, to take an account of what was due to the plaintiff from the defendants respectively, for and in respect of the several titheable matters and things since Michaelmas 1803, on that part of their farms and lands in the pleadings of the cause mentioned, denominated the new inclosures; and that what should be found due from the said defendants in respect thereof be answered and paid by the said defendants respectively to the said plaintiff, —concluding with the usual directions.

HARWARD, Clerk, *v.* SIMS.

THE plaintiff, (vicar of *Marston, Oxon*,) filed this bill for an account of small tithes and agistment.

The defendants, denying the plaintiff's title, set up a modus of 6*d.* an acre, payable in lieu of all small tithes.

The money payment was established in evidence by the parol testimony.

The book known by the name of Archbishop Wells's book of endowments rejected as evidence at Nisi Prius; the Lord Chief Baron (Thomson) and Mr. Baron Wood having expressed considerable doubt of its admissibility, on the hearing of the cause in the Exchequer, their Lordships treating it as a mere private memorandum, wanting authenticity and originality.

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In answer to that evidence, the following extract from the book which was the subject of discussion in *Leonard* v. *Franklin*, and which was called an ancient book of endowments in the time of Bishop *Wells*, who began to preside over the see of *Lincoln* in the year 1209.

"*Oxon—Merston*—Vicar in Ecc̃æ de Merston que "est' dc̃or prioris & convent^s sc̃e. Tretheswide auct. "concil. ordinat. consistit in omnibus obventionibus "altaris cum minutis decimis totius parochie & in de- "cimis bladi & feni provincentib3 de una virgata terre "in eadem villa scil^t quam Osbert^s fili^s Herwardi "tenet Hebit etiam vicari^s domos & Curiam in quibus "Capetlanus manere solebat & valet vicar v. mar. & "total. Ecc̃ xviii mar: & sciere expressum fuisse in "ordinatione istar triu vicariar & vicarie de Frethewell "q̃d sub nomine minutar decimar non continent decime "feni seu molendinor."

And it was contended, that as that document was evidence that the value of the vicarage was, since time of legal memory, only five marks, and the whole church only eighteen, there could not have then existed a modus, for according to the extent of the parish, 6*d.* an acre would amount to more than double the value of the church.

Leach, for the plaintiff.

The *Solicitor General*, *Dauncey*, and *Wingfield*, for the defendants, objected to the entry read from the book, and contended that it was not evidence.

The Court directed an issue on the strength of the evidence of the money payment; and in delivering judgment, the Lord Chief Baron (THOMSON) adverting to the book in question, observed—

That

That it was clear from the parol evidence that an issue must go;—that the 6*d.* had been proved to have been always paid;—that all that remained, therefore, was the effect of the entry in this book, or the valuation. On that evidence his Lordship observed, that there was no proof who made it;—that it was a bare memorandum posterior to the endowment, and therefore had not the weight ascribed to it in argument. 1810—11.

His Lordship added, that it was common in those days to undervalue the several vicarages, which was material to affect its authenticity as evidence of the value, and that therefore, on the whole, the payment ought to go to a jury.

Mr. *Baron Wood* appears to have said, that it was his wish also to express a doubt, whether the entry was evidence at all. And his Lordship said, that if an issue were tried, that question might be decided by means of a bill of exceptions.

An issue was directed, and it went down for trial at the summer assizes, 1811, for the county of *Oxford*, before Mr. Justice Le Blanc and a special jury, when the same book was offered in evidence by the counsel for the plaintiff, to prove the value of the vicarage since the time of legal memory, and to show that so large a payment for the small tithes, as compared with the value of the vicarage at that time, could not be a *modus*, when,

Le Blanc, *Justice*, refused to receive it, observing, that no collection or history compiled by any individual could be admitted; but that, perhaps, if it were shown to be an official document it might be received.

Mr. *Hewlett* was then called, who stated that the book was of the hand-writing of the time of King *John*; that it contained entries of endowments; that the

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collection was the act of the ordinary, but that it was not a judicial act, but an historical collection of matters of ecclesiastical concern; and that the book was known by the name of Archbishop *Wells*'s Endowments.

On that testimony, *Jervis* and *Taunton*, for the plaintiff, contended that the book ought to be received, coming as it did from the proper custody, being produced by Mr. *Fardell*, the register of the diocese of *Lincoln*, from the registry where it was deposited among the muniments of the diocese: and that it was entitled to equal consideration with the survey of a religious house; but

Le Blanc, *Justice*, still refused to admit it, saying, that the entry was not shown to have been contemporaneous with the endowment, or even to have been original; that it was not equivalent to a survey, which was an original and public document taken by authority, whereas the book in question was not proved to have been compiled under the sanction of any authority, but was merely a collection of memoranda, made by some one who was not known, and therefore came within the rule, that a memorandum made by a private person could not be received in evidence.

Extract of one of the latest Leases of *Sutton Holwood*, *Referred to in* Leathes *v.* Newitt, *p.* 355.

Indenture of demise, dated 14th *June*, 48 *Geo.* III. between the dean and chapter of *Ely* and *William Charter*, for a term of twenty-one years, rent 30 *l.*

Covenant, that *Charter*, his executors, &c. would "yearly and every year during the said term, pay the "tenths of all the profits that shall grow, arise or increase "in, by, or throughout the said demised premises, to the "vicar of *Sutton* aforesaid, for the time being."

EXTRACTS of one of the leases of *Middlemoor*, *Referred to in* LEATHES *v.* NEWITT, *p.* 355.

INDENTURE of Lease, (24th *Nov.* 41 *Geo.* III.) between the Dean and Chapter of *Ely* and their lessees, of all that their several pasture commonly called *Middlemoor*, lying and being within the parish and bounds of *Sutton* aforesaid, with all the profits and commodities thereunto belonging or appertaining, in as large and ample a manner as any of the inhabitants of *Sutton* aforesaid, or certain inhabitants of *Blunhsham* and *Earith*, or the right honourable Lord *North*, or any other person or persons have had, held, used or occupied the same as the tenant or tenants of the said Dean and Chapter or their predecessors, excepting and always reserving out of this present demise, all those parts or parcels of the said pasture grounds, called *Middlemour*, late employed by the undertakers about the draining of the lands there, containing fifty acres or thereabouts, to the said Dean and Chapter and their successors, and also one fishing called the *Deep*, and also ten menmaths called the *Reedy Holmes*, and all and singular the profits and commodities thereunto belonging, or in otherwise appertaining.

Covenant—that they the said lessees, their executors administrators and assigns, and every of them, shall and will, during the continuance of this demise, permit and suffer the vicar of *Sutton* for the time being and his successors, quietly and peaceably to have hold and enjoy a piece of ground called the *Harp* and *Gatestead* in *Sutton* aforesaid, from every feast of the Annunciation of the *Virgin Mary* in every year during the same term, until the first day of *August* then next following, called *Lammas Day*, together with the crop thereof coming and

and growing: and also shall and will from time to time and at all times hereafter from the date of these presents, during the continuance of this demise, permit and suffer the vicar of *Sutton* aforesaid for the time being and his successors, yearly and every year peaceably and quietly to have hold and enjoy his part belonging to the vicarage-house, together with the tithe of grass and fodder yearly growing, renewing and coming upon the said pasture called *Middlemoor*, and all other commodities, profits and advantages belonging to the vicarage of *Sutton* aforesaid, without asking, demanding or receiving of the said vicar for the time being or his successors any sum or sums of money, either towards the charge of the fine paid to the said Dean and Chapter or their successors for the renewing of the lease of the said demised premises, or the rent by these presents reserved to be paid to the said Dean and Chapter and their successors. But if it shall happen by the consent of the lessees and the inhabitants of *Sutton* aforesaid, or the greatest part of them, that the said pasture called *Middlemoor*, shall be fed with cattle before *Lammas Day*, in any of the said years, that then the said lessees and inhabitants, their executors administrators and assigns, shall pay every year, when the same is so fed, unto the vicar of *Sutton* aforesaid for the time being, the sum of sixteen pounds of lawful money of *Great Britain*, at or upon the first day of *August* in every of the said years, in lieu of the tithe of the said pasture called *Middlemoor*.

THE passages of the *Agreement* and *Decree* upon which the main point in the Cause of LEATHES *v.* NEWITT turned, are set out *verbatim* in the following extract.

AFTER reciting that theretofore (20th *January* 1622), *Henry Cæsar*, D. D. Dean of the cathedral church of *Ely*, and the chapter of the same church, "lords of "the manors or lordships of *Sutton* and *Mepall*, within, "&c." complainants exhibited their bill of complaint in Chancery against Sir *Miles Sandys*, knt. and bart. and a great number of other persons, concluding with *Richard Wignore*, clerk, and *Wm. Barwell*, clerk, defendants, "being all tenants or commoners "in the said manors, or one of them,—That whereas "within the said manors or lordships there were large "and spacious commons, being fenny and marsh grounds, "wherein all the tenants of both the said manors which "inhabited in any of the ancient commonable houses "or tenements in either of the said manors, have "always, time out of mind, both for themselves and "their farmers, had common of pasture for all their cattle, "levant and couchant, in and upon," &c. "at all times "of the year, which said common, fenny and marsh "grounds, by reason of such promiscuous feeding of "them in common, had theretofore yielded unto the "said tenants little or no profit at all;" for that amongst so great a multitude of commoners, there could be no consent in opinion to one and the same kind of husbandry, by reason whereof it had been rather the cause of rotting and starving, than feeding and fatting the cattle depastured there;—wherefore, for the benefit of each of them, and the commonwealth in general, by rearing and feeding great numbers of cattle, "the truth "of all which manifestly appearing to the ablest and "discreetest of the said complainants, tenants within the "said manor, as namely, the said Sir *Miles Sandys*," (and some others of those before named, omitting very many

many of them *and the vicars*), these the said last-mentioned tenants, upon due consideration, &c. and knowing that there could be no division of common, &c. without the consent of the complainants, earnestly entreating their assent, therefore, and the better to induce them, voluntarily offered that a competent part of the said common, fenny or marsh ground should, with their willing consent, be allotted unto them the said complainants, in respect of the benefit which they as lords might, by way of agistment or approvement, otherwise raise out of the same, which then by that intended division the said complainants were to lose:—that thereupon articles of agreement were made and set down in writing, on the 28th *Sept.* then last, between the said complainants and the last-named persons, their tenants, for and on behalf, as well of themselves as of all other the freeholders, copyholders and farmers within the said manor:—1st. That complainants and their successors, in lieu of all such improvements as they might challenge to make in the said fenny and common ground within the said manors, should have and retain always afterwards to them and their successors in severalty, all that fenny ground in *Sutton* aforesaid, commonly called *Little Holhwood Fen*, and all the commons within the said manors, to be from thenceforth utterly excluded, &c. as to that fen; and in consideration thereof, that the complainants should be excluded and debarred from all benefit and commodity whatsoever to be raised in, upon and out of all or any of the residue of the said common or fen ground within either of the said manors; all which residue, except *Mepall Gall Fen*, was to be divided and used as follows; to be laid out and alloted to every manor-house, freehold and copyhold, and farm-house, 14 acres apiece, by statute measure, of the best common fen ground within the said manors respectively; to every other dwelling-house, two acres only, to be held and occupied for ever, and not to be

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severed or aliened from the said houses; to every two acres of upland or arable ground, one acre of low or fen ground, by the 18 feet pole, to be held therewith in severalty for ever; and the residue to be set out for the relief of the poor: Proviso, that every allotment should be set out of the common next adjoining the said several manor-houses and demesne lands respectively. No fine to be afterwards paid, on the admission of any copyholder within either of the said manors, for or in respect of any of the said allotments;—that any owner or farmer of grounds lying in *Sutton Medlands* or *Mepall Burre Fen*, which formally had been several, from the Annunciation in every year until *Lammas Day* only, might at any time thereafter, inclose so much thereof, as should please such owners or farmers, to hold in severalty all the year, (leaving sufficient ways, &c. for others to pass to their grounds); and that the rest should be fed in common by the owners of those grounds only, not so inclosed, after the proportion of one horse for every two menmaths, or three bullocks for every four.

They then agreed that the said articles of agreement should be ratified by decree of the Court of Chancery: and for that purpose, many of the defendants put in their answers confessing the complaint, &c. &c. (in the words of the agreement) praying a decree accordingly; and that a commissioner might be authorized to make the allotments.

The defendant, *Richard Wigmore*, (the then vicar) answered separately. He admitted the complainants to be lords of the said manors and lordships of *Sutton*, whereof he (*Wigmore*) was then incumbent vicar, and of *Mepall* aforesaid; and the defendant, *Wigmore*, (admitting the recitals of the bill) further said, that he was content, and agreed to the said division, "so that he "the said defendant might have, for his part, allotted "unto him and the succeeding vicars for the time being,

" being, 20 acres by the 18 feet pole between ditches,
" lying next unto one fen called *South Medlands*, for
" and in lieu of his and their right of commonage in
" the said common, and 20 acres, by the like measure,
" lying in *South Fen*, called *Beeston*, lying next unto
" one fen called *Wentworth Fen*, in consideration that
" he the said defendant nor the succeeding vicars
" should thereafter demand, in right of his and their
" said vicarage, any tithes out of any of the said com-
" mons, after they should be divided and allotted as
" aforesaid, except the tithe of milch kine, calves, foals,
" sheep, pigs, geese and such like, and except the
" tithe of one fen called *Little Hollwood*."—He then joined in praying the decree for an allotment.

Therefore, in Easter Term, 21st *James* I. the Bishop of *Lincoln*, Lord Keeper, ordered and decreed that the said agreement should be ratified and confirmed by decree of the Court, and that a commissioner should be awarded, as prayed, to make the required allotments; and decreeing the prayer of the vicar in the same terms.

The commission being returned, amongst other allotments was the following: *Mepall* ancient houses shall have *Widden Fen* for four score acres, and the rest of their lots in *North Fen*, at *Alinseburge* and *Sotogo*, along towards *Chatteris* division, their ancient houses to be served first, and next unto them that have allotment of eight acres; and further, that the parson shall have sixteen acres in lieu of his tithes in *Mepall*, in like manner as it is in the decree for tithe for the vicar of *Sutton*; and the same sixteen acres to be in two parts, all next to the lots which he has to his parsonage-house.

AN

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PRINCIPAL MATTERS.

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ABANDONING CONTRACT.

Vide CONTRACT.

ACCEPTANCE

(Of Bill of Exchange.)

In an action on a bill of exchange against the acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs, on evidence that the defendants knew, when they accepted it, that the payee was an infant, and that he had, in fact, indorsed the bill before they accepted it; the Court, under those circumstances, (it appearing also that the defendants had been in the practice of raising money on similar bills,) refused to disturb the verdict by granting a new trial, applied for on the ground of the legal objection,—that an infant could not, by his indorsement, give currency to a bill of exchange; but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation.

Jones v. *Darch* - - - - - 300

ACCOUNT

(Stated and settled,—Plea of, and what Averments it should contain.)

Vide PLEADING IN EQUITY, N° 1.

ACCOUNT,

(Where Plea of, not good.)

Vide PLEADING IN EQUITY, N° 3.

It is not such matter of account between the parties as will operate to give a defendant at law an equity to restrain proceedings for the balance of a previous account stated and settled, that the plaintiff at law was, at the time of such settlement, and had subsequently become indebted to the plaintiff in equity, for business done as his agent.

Hirst v. *Peirse* - - - - - 339

Vide SET-OFF.

ACTION,

(On the case for Words.)

What will support.

Vide PLEADING, N° 5.

ADMINISTRATRIX

(Claiming under Marriage Articles, need not set them out in Pleading.)

Vide PLEADING, N° 3.

AFFIDAVIT.

1. Where a defendant in an extent has moved to quash the proceedings on affidavits, if they are satisfactorily answered, whereby the rule is discharged, he will not be permitted afterwards to enter a claim and traverse the inquisition.

Rex v. *Bickley* - - - - - 323

(Made in support of Bill for an Injunction.)

2. The Court will, on application by a defendant, order such an affidavit to be filed, for the purpose of giving him an opportunity of answering its contents, although it is not otherwise the usual course of practice to file it.

Scott v. *Becher* - - - - - 346

3. *Vide* TROVER.

AGREEMENT.

Vide CONTRACT.—SPECIFIC PERFORMANCE.

ALLOWANCE

(Of Writ of Error.)

Vide PRACTICE, N° 5.

(Of Extra Costs.)

Vide SHERIFF.

ALTERAGIUM,

(Verbum.)

"*Alteragium*" is a word explicable only by the usage shown to have been established under it.

Williams v. *Price* - - - - 156

AMENDMENT

(Of Bill.)

The Court will not allow a plaintiff to amend his bill where he has been dilatory, without reason, in his former proceedings.
And, refusing such an application, they will do so with costs.
Milward v. *Oldfield* - - - - 325

(Of Scire Facias—mis-reciting Inquisition.)

Vide PRACTICE, N°s 13, 14.

ANNUITY.

Vide INJUNCTION, N° 3.

ANSWER.

Vide EXCEPTIONS TO.—INJUNCTION.

APPEARANCE.

Vide PRACTICE, N° 11.

ARBITRATION.

Vide AWARD.

ARREST,

(Under Attachment for Nonpayment of Costs.)

Vide SHERIFF.

ASSIGNEES.

Vide BANKRUPT.—PARTNERS.

ASSIGNMENT

(Of Bond.)

Vide BOND, N°s 3 & 4.

ASSUMPSIT, SPECIAL,

(Declaration in.)

For money lent to a wife must aver request of husband, or it is bad, even after judgment by default; nor is the omission cured by a count laying it to have been lent at the request of husband and wife.
Stone v. *M'Nair* - - - - - 48

ATTACHMENT

(For Nonpayment of Costs.)

Vide BAIL, N° 1.

ATTORNEY.

Vide BANKRUPT, N° 2.—COSTS, N° 8.—SOLICITOR.

AVERMENT

(That Interest is paid,—where not necessary, in an Action of Debt for the Principal.)

Vide PLEADING, N° 9.

AWARD.

The Court requires strong facts, and to be distinctly stated, in cases of setting aside an award; and a denial of any such is conclusive.

Beddington v. *Southall* - - - 232

Vide WITNESS, N° 1.

B.

BAIL.

1. A sheriff is not authorized by the 23d H. VI. cap. 10, to let out of custody on bail, a defendant taken under an attachment, issuing out of Courts of law for non-payment of costs, because such a process is in the nature of, and in effect, an execution.

Phelips v. *Barrett* - - - - - 23

(Justification of,—Rule regarding.)

2. The Court desired that it might be understood that the rule of Easter Term, 56 Geo. III. respecting the order of motions for justification of bail,* would in future be peremptorily enforced; and they announced, that as very much inconvenience had been experienced by the desultory manner in which such motions had hitherto been made, they would not henceforth admit bail to justify, unless the justification were moved, in conformity with that order, *at the sitting of the Court.*

Memorandum - - - - - - - 155.

* *Vide ante*, Vol. II. p. 327.

BAIL BOND.

Vide SHERIFF, N° 2.

BANKRUPT.

1. A bankrupt having obtained his certificate under a joint commission issued against him and others, is not estopped, when suing a stranger in trover, from controverting the validity of the commission, or from taking advantage of its illegality, as against such stranger, between whom and the plaintiff there is no reciprocity.

Quære, Whether a joint commission sued out against three persons, pending two previous separate commissions against two of them, is valid in *law* as against the third, and whether the assignees appointed under the two former commissions, (who were also assignees under the last,) can maintain an action of trover to recover property of such third person jointly with him; or whether it be absolutely void at law, so that the person who is the object of it cannot so join in the action: or whether such subsequent commission be merely voidable, and suspends his right to join in the action till the former commissions are established, or the last superseded?

Butts v. *Bilke* - - - - - - 240

(Partners.)

2. One partner making bankrupt another, whom he has prevailed on to join him in his business (an attorney) for

for a certain term, and to pay him a premium in consideration, will be ordered to refund such part of the premium as shall be commensurate with the remainder of the term.

Hamil v. *Stokes* - - - - - 161

BARON AND FEME.

Vide PLEADING, N° 7.

BELIEF

(Of Facts alleged.)

Where sufficient to obtain an injunction.

Vide INJUNCTION, N° 6.

Where injunction dissolved on.

Vide INJUNCTION, N° 7.

BILL OF EXCHANGE,

(Referring to compute Principal and Interest on.)

Vide PRACTICE, N° 2.—USURY.

(When lost, may be sued for in Equity.)

1. The indorsee of a bill of exchange which has been lost, has a remedy against the acceptor by bill in equity to compel payment, and that although he might have recovered on the bill at law, his equity being founded on the want of power in a court of law to impose terms on the plaintiff of giving the defendant security against the forth-coming of the bill, which would have been good ground for an injunction to restrain such an action.

Nor is it any answer to such a suit, that the bill of exchange was a mere accomamodation bill; that the plaintiff might have applied before; or that the drawer has since become insolvent.

The plaintiff is not bound in a court of equity, to institute such a suit within any particular period.

It is not necessary to make the drawer a party.

Davies v. *Dodd* - - - - - 176

2. In an action on a bill of exchange against the acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs, on evidence that the defendants knew, when they accepted it, that the payee was an infant, and that he had, in fact, indorsed the bill before they accepted it; the Court, under those circumstances, (it appearing also that the defendants had been in the practice of raising money on similar bills,) refused to disturb the verdict by granting a new trial, applied for on the ground of the legal objection,—that an infant could not, by his indorsement, give currency to a bill of exchange; but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation.

Jones v. *Darch* - - - - - 300

(What Transactions do not alter Property in, for want of Consideration.)

3. Where orders have been sent by an insolvent merchant to his agents abroad, to hold balances in their hands

hands at the disposal of certain persons named by him, who are, in point of fact, appointed trustees for his general creditors, by a deed termed a deed of inspection, in which he relinquishes all claim to his business, but agrees to conduct it to the winding up, on their account, as their agent,—held not to protect bills of exchange transmitted by such foreign agents, made payable to the insolvent, to satisfy balances due to him in their hands, from a creditor not a party to the deed, on whose behalf the sheriff has seized the bills, under an extent, whilst in his possession and unindorsed, against such a proceeding, resorted to after the arrangement, although the foreign agents have acceded to such arrangement; because, for want of a specific appropriation of the bills, and an express consideration *quoad* those particular bills, being shown to have been the foundation of their being assigned to the trustees, they were held to be the property of the insolvent merchant, notwithstanding the arrangement, and therefore lawfully seized.

Rex v. *Hunter* - - - - - 258

BILL,

(In Equity, Prayer of.)

Vide ELECTION.

(Of Costs.)

The Court cannot order a solicitor's bill of costs for business done wholly in the house of lords, in the prosecution of an appeal, to be referred for taxation; because their officer has no means whereby he may be enabled to tax such a bill.

Williams v. *Odell* - - - - 279

BOND,

(For securing Money.)

1. A bond given by the purchaser of a contingency, which no longer existed, at the time of the bargain, (as of the reversion expectant on an estate tail, the tenant in tail having, in fact, suffered a recovery,) will be ordered to be delivered up to be cancelled, and the interest paid on it to be refunded, although there was no fraud, and both parties were alike ignorant of the fact of the contingency having been destroyed.

Hitchcock v. *Giddings* - - - 135

2. Bond given for securing a premium payable by instalments, as the consideration of an admission to a partnership for a certain period, will be ordered to be delivered up to be cancelled, if the original partner cause the other to be made a bankrupt, whereby the partnership is dissolved.

Hamil v. *Stokes* - - - - - 161

3. Nor will the Court allow a *bonâ fide* creditor, to whom the bond to pay the instalments has been assigned as a security for his debt, to put it in suit, because all equities follow the bond into whatever hands it may have come, and they will order the bond to be delivered up to be cancelled.

Ib.

4. A plaintiff praying an assignment of a bond alleged to have been satisfied by the payment of the sum due on it, from the defendant, by the testator

testator in his life-time, on account of the defendant, referred to the Deputy Remembrancer, to ascertain the facts of the debt having been satisfied,—on whose account,—and whether it was a specialty, or due on the bond.
Jackson v. *Radford* - - - - 274

5. Such an assignment not being available, the Court would direct (if they relieved the plaintiff,) that the obligees shall permit their names to be used by the plaintiff in putting it in suit.
Ib.

(To the Crown.)

Vide EVIDENCE, N° 1.

BLACKING,

(Making for Sale.)

If there be vinegar, or a liquid in progress of preparation for vinegar, in the composition, it is liable to the duty of excise on vinegar.

Vide CONSTRUCTION OF STATUTES, N° 4.

BOOKS,

(What, and when Evidence.)

Vide EVIDENCE, N°s 8. 10.

Leonard v. *Franklin* - - - - 264
Halse v. *Eyton* - - - - - } Ap^x.
Hebden v. *Freeman* - - - - }
Harward v. *Sims* - - - - }

C.

CARRIERS,

(Liability of.)

Where a valuable bank parcel sent by a stage-coach is lost, and it is proved that on the arrival of the coach, the driver was in liquor, and that the bookkeeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it:—held to be a loss arising from gross negligence, and that the proprietors were liable as carriers for the value, notwithstanding they had put up the usual notice in their office, disclaiming liability to make good losses beyond five pounds.
Bodenham v. *Bennett* - - - - 31

CAUSES,

(Before the L. C. B. alone.)

Days appointed for hearing - 21

CLAIM,

(Pleading.)

Where defendant in an extent will not be permitted to claim.

Vide AFFIDAVIT, N° 1.

COMMISSION

(Of Bankruptcy.)

Vide BANKRUPT.

COMPOSITION,

(Real.)

To make out a defence to a bill for tithes, of a composition real, it is not enough to show that the same money-payment has been constantly received in satisfaction of the tithes for a considerable period before the 13th Eliz.; but evidence must be given of the existence of an agreement in writing, and that it was made between all the proper parties interested.

Bennett v. *Skeffington* - - - 143

CONCLUDING,

(To Country.)

Vide PLEADING, N° 6.

CONDEMNATION

(Of Goods seized.)

Record of—of what evidence.

Vide EVIDENCE, N° 1.

CONDITION

(Precedent to a Contract, what is not.)

Vide PLEADING, N° 1.

CONSIDERATION

(Of Marriage Settlement.)

On pleas of retainer and *plene administravit*, pleaded to on action for a simple contract debt, need not be set out more fully than by referring to the articles, and averring the marriage had.

Harry v. *Jones* - - - - - 89

(For assigning over Bills of Exchange.)

Vide BILL OF EXCHANGE.

CONSTRUCTION

(Of Statutes.)

1. A statute imposing a duty on the property of persons residing in *Great Britain*, applies to persons residing there for any length of time, however short, although they may, at the same time, have a more permanent residence elsewhere.

Attorney General v. *Coote*, bart. - 183

2. An exemption of persons coming to reside, "for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not have actually resided in *Great Britain* for the period of six successive calendar months," does not include a person taking a house in *London*, and furnishing and residing in it for a less period than six

six months at any one time, and who then goes elsewhere with his establishment, and resides for the remainder of the year there, leaving behind him some one merely to take care of the house.
Attorney General v. *Coote*, bart. - 183

3. Such a person is, therefore, within the act of the 46th Geo. III. ch. 65; but not within the exemption of the 51st section.
Ib.

4. A maker of vinegar for sale, whether as vinegar, or as blacking, or as any other article not being vinegar properly so called, or pure and applicable to the common uses of vinegar, is liable to the duty of excise, and the other provisions of the several statutes relating to the makers and preparers of *vinegar* for sale.
Attorney General v. *Green* - - 224

5. Where a general act of parliament confers immunities, which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; *expressio unius est exclusio alterius.*
Warden, &c. of St. Paul's v. *The Dean* - - - - - - - - 65

CONTEMPT.

A plaintiff who has obtained an order for an injunction is not entitled, in point of practice, to serve it with the writ of execution before it be passed and entered, although it is usual to do so; and if he should so serve it, and there should be an error in drawing up the order, to the prejudice of the defendant, it will be considered a contempt, and so treated by the Court on an application to them to punish the plaintiff for so doing; nor will the plaintiff be suffered to avail himself of the excuse of its being a mistake; and all the costs incurred by the defendant, arising from such an irregularity, will be ordered to be paid by the plaintiff.
Scott v. *Becker* - - - - - - 346

CONTINGENCY.

Vide CONTRACT, N° 2.

CONTRACT,

(Construction of.)

1. Between a merchant and the managing owner of a ship, the latter undertaking to receive the merchant's cargo, on her arrival at a certain port, and sail therewith to England with the next June convoy (provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy), that he (the merchant) would provide a cargo of produce in time for her to load the same, and join the June convoy for England, provided she arrived, and was ready to load within that time, and notice thereof was given to the merchant's agents, he is bound to provide the cargo, though not in time to sail with the convoy; for the arrival of the ship is not made a condition precedent to the supplying of the cargo in all events by the terms of the contract, but

but only to the supplying it by the given time.

Deffell v. *Brocklebank* - - - 36

(For the Purchase of a Contingent Remainder.)

2. Where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail; if, at the time of the contract, the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed, and an absolute bond given for securing payment of the purchase-money;—this Court will interfere to rescind the contract, on the equity that the vendor had no interest in the subject-matter at the time of the sale. And that on the ground of mistake, although there has been no fraud from knowledge, or concealment of the fact, on the part of the vendor.

And they will not only order such a bond to be delivered up to be cancelled, but that all interest paid on it shall be refunded.

Hitchcock v. *Giddings* - - - 135

(Abandoning.)

3. A purchaser cannot declare off a contract, on the ground of the vendor not having perfected the title within a reasonable time, where the former who was in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negociate with the latter down to a recent period, and then on a sudden, (a fortnight after the last act of negociation,) tells him that he abandons the contract.

Warde v. *Jeffery* - - - - 294

CONVEYANCE.

Where a confirmed purchaser of premises, under a decree of the Court, died before any conveyance was made to him, having in the meantime devised his interest therein to trustees, the Court ordered that a conveyance should be made to them, without the consent of the testator's heir at law, he being an infant.

Rex v. *Gregory* - - - - - 380

COPY

(Of Terrier lost.)

Vide EVIDENCE, N° 12.

COSTS.

1. Bill of a rector claiming tithe of seeds against a vicar, expressly endowed "of small tithes *generally*, except *hay*," on the ground of perception against non-perception, dismissed *with costs.*

Dorman v. *Curry* - - - - 109

2. In a suit to be relieved against the purchase of a contingency, in fact destroyed at the time of the bargain between the parties, though without the knowledge of either, no costs given on either side.

Hitchcock v. *Giddings* - - - 135

(Attachment for Nonpayment of.)

Vide BAIL, N° 1.

3. If inefficient cause be shown against an application by a sheriff claiming extra allowance, for a reference to ascertain what he is entitled to, and the Deputy Remembrancer be attended to resist or diminish the sheriff's claim, he cannot be allowed the costs of either the application or the reference*.
Rex v. *Fereday* - - - - - 131

4. An account of tithes decreed on the ground of mis-pleading a modus, where there was such evidence of the payment set up, as to show that the defendant had merits, *with costs.*
Gillibrand v. *Scotson* - - - 267

5. The Court will not order a party who is in prison, applying for a new trial on the ground of excessive damages having been given against him, to pay the costs of the former trial, before the plaintiff proceed to show cause against the rule.
Goode v. *Lewes*, Knt. - - - 307

6. Costs not allowed to land occupiers, failing in a defence of composition real to a rector's bill for tithes, *for want of evidence of the existence of a grant*, although it was proved that the money-payment had been paid to the rector *from* 150 *years before the* 10*th Anne*, (and consequently before the restraining statute) when *the then rector* first agreed with the parishioners to receive such payment in lieu of tithes.
Bennett v. *Skeffington* - - - 143

7. But the *landlords* of such occupiers having been made defendants, *they* were allowed *their costs.*
Ib.

8. Solicitor's bill of costs for business done in parliament, cannot be referred for taxation.
Williams v. *Odell* - - - - 279

9. Costs of issues to try moduses reserved.
Layng v. *Yarborough* - - - 383

10. Costs incurred by the irregularity of one party to the prejudice of another, to be paid by the author of such irregularity.
Scott v. *Becher* - - - - - 346

11. The Crown moving to amend a *scire facias* after plea, pays costs as the terms on which the motion is granted.
Rex v. *Scott* - - - - - - 181

Vide PARTNERS, N° 2.

COVENANT,

(Declaration in Action on.)

Vide PLEADING.

COUNT.

Vide PLEADING, *passim.*

COUNTRY,

(Conclusion to.)

Vide PLEADING, N° 6.

* *Vide ante*, Vol. I. 205.

CREDIT,

(Transfer of.)

Vide PARTNERS, N° 1.

CURTILAGE*,

(Verbum.)

The word curtilage in an endowment, will not, *per se*, give the vicar the tithe of all articles originally grown in curtilages.
Williams v. *Price* - - - - 156

CUSTODY

(Of Documents,—and particularly of those relating to the Church.)

What proper to make them evidence.

Vide EVIDENCE, N°s 2. 7.

D.

DAMAGES.

Vide INTEREST, N° 1.

DEBT.

Vide INTEREST, N°s 1 & 2.—PLEADING, N°s 3, 4, & 9.

DECLARATION.

Vide PLEADING, *passim.*

DECREE.

A plaintiff is allowed the vacation of the term in which the decree is pronounced, and the following term to draw up the decree in, but not the vacation of the last term. And if *he* does not draw it up in that time the defendant may.
Calvert v. *Dignum* - - - - 133

DEAN

(Of St. Paul's.)

Is not a great man within the meaning of the exemption in the decree made under the stat. of 37 H. VIII. ch. 12, regarding the payment of tithes in London.
Warden, &c. of St. Paul's, v. *The Dean* - - - - - - - - 65

DEANERY

(Of St. Paul's.)

The dwelling-house of the dean not exempt from the payment of tithes to the parson of St. Gregory.
Ib.

* *Vide* Spelman's Gloss.

DEATHS.

Vide MEMORANDA.

DEMURRER,

Vide PLEADING, Nos 3 & 4.

(In Equity.)

Demurrer by a judgment creditor to a bill, for an injunction to restrain him from taking out execution on his judgment, against an estate sold before he obtained judgment, and ineffectually conveyed to the purchaser (the plaintiff),—whereby the legal estate descended, since the date of his judgment, to the heir at law,—overruled.

Prior v. *Penpraze* - - - - - 99

DEPUTY REMEMBRANCER.

Vide EXCEPTIONS, Nos 1, 2.—PRACTICE, No 8.—ELECTION.

DESCENT.

Vide INJUNCTION, No 2.

DIRECTION

(Of Judge.)

Vide NEW TRIAL.

DISCHARGE

(Of Partners.)

Vide PARTNERS.

DISCOUNT

(Of Bill of Exchange, as distinguished from Sale of.)

Vide USURY.

DISCOVERY.

1. The Court will not decree a discovery against bankers suing the plaintiff (in Equity) for the amount of certain cheques drawn on them by him, on the ground of their having been given on a particular account, which the defendants (in Equity) deny.

Askam v. *Thompson* - - - - 330

2. Nor will they order the defendants to produce the cheques, that the language of them may be discovered, because such discovery could not be of use to the plaintiff (in Equity) on the trial at law.

Ib.

DISMISSAL

(Of Bills.)

Vide PRACTICE, No 4.

DOCUMENTS.

Vide EVIDENCE, Nos 2, 3. 6. 8, 9, 10, 11.—TITHES.

E.

EJECTMENT.

A lessee proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title, not to pay him any more rent, and has been threatened with a distress by his landlord, if he does not;—cannot sustain an injunction in Equity to restrain either the ejectment or the distress; for he is not permitted by such means to bring his landlord's title into dispute.

Homan v. *Moore* - - - - - 5

ELECTION.

The Court will require a plaintiff (proceeding against a defendant for specific performance of an alleged agreement for a mortgage entered into by the defendant's testator, for securing money advanced to him on such agreement and other debts; *and also* for an assignment of a bond alleged to have been satisfied by the plaintiff's testator, and constituting part of the plaintiff's demand,) to elect one of such objects of the prayer of his bill, on the ground of inconsistency in the application for both, at one and the same time.

Note.—The plaintiffs having elected to pray an assignment of the bond, a reference to the Deputy Remembrancer was ordered, to ascertain the fact of the payment of the debt, and if paid, the nature of it.

Jackson v. *Radford* - - - - 274

ENDOWMENT.

Vide EVIDENCE, N° 2.—PERCEPTION, N°s 2, 3, & 4.

EQUITY.

A plaintiff in a suit may have a remedy in a Court of Equity, concurrently with a right to sue the defendant at law, where the former Court can give the parties mutual advantages not in the power of the latter.

Davies v. *Dodd* - - - - - 176

Vide BOND, N° 1.—INJUNCTION (*passim*).—INTEREST, N° 3.—JURISDICTION.

EVIDENCE.

1. *Gibbs*, Chief Justice, held, at Nisi Prius, that the record of condemnation was admissible in evidence on a defence to an action for the price of rum sold, to prove that the rum was adulterated, being *in rem*, but he refused to admit the record to conviction for penalties, stating, that as it was *in personam*, it was not evidence in any case where the parties were different.

Hart v. *M'Namara (in notis)* - 154

2. A book, from the Registry of Lincoln, containing, *inter alia*, what were called copies of endowments of certain vicarages, was received as evidence of an endowment of a vicarage in Northamptonshire, by the Lord Chief Baron (giving up considerable (doubt

doubt) on the production of cases wherein it had been received before.
Leonard v. *Franklin* - - - - 264
Halse v. *Eyston*, & *Hebden* v. *Freeman* - - - - - - - - - Apx
Sed Vide *Harward* v. *Sims* - - Apx

3. Perception of tithe of hay is sufficient evidence (although not received in kind, but by composition) of a right to that tithe by force of presumption of a subsequent endowment in the vicar, claiming it from the rector's lessees, who plead title under the *rector* by permissive retainer, the rector relying *on an express exception of that tithe by name* in the vicar's existing endowment, but giving himself no evidence of perception on his part or that of his predecessors.
Parsons v. *Bellamy* - - - - 190

4. As to what evidence is sufficient to support such a claim against such a defence, see the proofs as detailed in the case. *Ib.*

5. It is not sufficient that a vicar,—who rests his case on presumption of an endowment from evidence of perception,—prove that he has received the tithes claimed from the rest of the parish generally, and even from part of the district in which the defendants lands are situate, unless he carry it to the parts for which the exemption is claimed by the defence. And the vicar not doing so, proof on the part of the defendants, that no tithe has ever been paid for their lands, will entitle them to an issue.
Armstrong v. *Hewitt* - - - 216

6. Nor will the Ecclesiastical Survey (stating the vicar to be entitled to tithe-hay in the parish generally,) supply the absence of proof of perception from the *particular* lands. *Ib.*

7. The three legitimate repositories of terriers and vicars books, to make them evidence, are, the church-chest—the registry of the bishop—and the registry of the archdeacon.
Armstrong v. *Hewitt* - - - 216

8. A receipt for payment (by a person sued by a vicar for tithes) of the plaintiff's bill of costs, is evidence of the suit having resulted in favour of the vicar.—So is an entry to that effect in a former vicar's books.
Parsons v. *Bellamy* - - - - 190

9. Letters written by a foreign agent, assenting to an arrangement, transferring property, received in evidence to prove such assent, on an extent against the principal.
Rex v. *Hunter* - - - - - 258

10. The vicar's books are evidence to show, that the money payments received in lieu of tithes are founded on, and regulated by, a criterion not in existence beyond legal memory—*e. g.* the poor's rates.
Walter v. *Holman* - - - - 171

11. A copy of lost terrier not admissible in evidence.
Leathes v. *Newitt* - - - - 355

12. Non-perception of vicarial tithes by either vicar or rector, (the latter admitting the vicar's right, except as to certain titheable articles, there being no third claimant,) in certain parts of the parish throughout which the vicar receives some small tithes, is negative evidence in favour of the vicar's right to all other than the excepted articles.
Ib. - - - - - - - - - - 374

13. Disclaimer of a rector binds his lessees.

(Presumptive.)

14. Evidence of deficiency in a fish-curer's stock of fish-salt, and of his cart being found in the act of carrying salt from his herring-hang, under a misrepresentation of the contents, and other suspicious circumstances, having been left to the jury to say whether he had *delivered salt to a person not being a fish-curer, contrary*, &c.—held to have been properly so left, and to be sufficient to sustain a verdict for the Crown on such a charge.

Rex v. *Horton* - - - - - 150

15. Other money-payments put in evidence by a vicar than those set up by the occupier, cannot be considered moduses, unless he also show by the evidence that such payments have the requisites of moduses in point of fact, as that they are of immemorial origin, and invariable amount. There is otherwise no ground for saying that the defendants are entitled to have an issue to try them.

Leathes v. *Newitt* - - - - 371

Vide Issue, N° 5.

EXCEPTIONS

(To Deputy Remembrancer's Report.)

1. Leave must be moved for to file such exceptions to the Deputy Remembrancer's report of title; and if that be not done, the motion to confirm the report is made absolute in the first instance.

Eyton v. *Dicken* - - - - - 303

2. But when the order to confirm the report is moved for, the purchaser may show exceptions *instanter* against the motion.

Eyton v. *Dicken* - - - - - 303

(To Answer.)

3. On an application for an injunction, to restrain bankers from proceeding at law, to recover the amount of cheques paid by them, on account of the plaintiff in equity, where the bill, which also prays a discovery, states that a partnership subsisted between the plaintiff and the deceased principal of banking firm, in another concern, of which the plaintiff had the conduct and management, and that the cheques were drawn under special circumstances, founded on a mutual understanding between the plaintiff and the deceased, to which the defendants in equity, (the surviving partners in the banking concern), were not privy, they denying positively, by their answer, that they were in any manner engaged in the concern as partners or otherwise; it is not matter of material exception to the defendant's answer, that under such circumstances they do not set forth, as required, the language of the body of the cheques drawn by the plaintiff as such managing partner, for having denied that they were in any way concerned or interested in the business, it would be of no service to the plaintiff, if it were so set forth, as that (if it were true) would avail him on the trial at law.

Askam v. *Thompson* - - - 330

4. To constitute what is called a material exception, or one on the opening of which an injunction will be granted, it is not only necessary that the charge is not fully answered, but the charge itself must be of such import that the answer will be of use to the plaintiff in his defence at law, and if that is not manifest, the want of answer will not entitle the plaintiff to an injunction.

Thus,

Thus, on an application for an injunction to restrain a defendant from proceeding at law to recover the amount of a promissory note, on the ground that there are accounts subsisting between them, leaving a balance in favour of the plaintiff, and that there have been other subsequent accounts between them, and charges said to be due to the plaintiff for business done, as attorney or agent; to all which matters the defendant is interrogated by the plaintiff's bill: if there be exceptions taken to the sufficiency of the answer, the court will not order a further answer, or grant an injunction on the ground of insufficiency, because the interrogatories and the charge relate to what is rather matter of set-off and defence at law, than of account raising an equity on which the court can interfere; for demands of such sort do not raise an account, so as to give such attorney or agent an equity against the holder of his promissory note, as in the case of money mutually due on both sides.
Hirst v. *Peirse* - - - - - 339

(Days for Hearing.)

Vide Notice published in Court, 28th April, 1817 - - - - - - 21

EXCISE DUTIES.

Vide CONSTRUCTION OF STATUTES.

EXECUTION.

The Court will not interfere on motion for that purpose to stay execution on a judgment recovered in trover, till the plaintiff shall do any act, however equitable, as to make the defendant a title to the subject matter of the action. They have no jurisdiction to do so.
Butts v. *Bilke* - - - - - 291

Vide BAIL, N° 1.—INJUNCTION, N° 2.

EXEMPTION

(From Tithes.)

Vide CONSTRUCTION OF STATUTES.—TITHES IN LONDON.

(From Property Tax.)

Vide CONSTRUCTION OF STATUTES.

EXTENT.

A bill of exchange, tainted with usury, getting into the hands of the Crown, under an extent against the person who illegally discounted it, is not more available than if it were still in the possession of that person.
Rex v. *Ridge* - - - - - - 50

Vide AFFIDAVIT.—LANDLORD AND TENANT.

EXTORTION.

Vide SHERIFF, N° 2.

EXTRA ALLOWANCE.

Vide SHERIFF, N° 1.

F.

FRAUD.

It is not necessary to show even legal fraud on every occasion of seeking relief in equity,—and a mere mistake will sometimes be sufficient.
Hitchcock v. *Giddings* - - - 135

Vide CONTRACT, N° 2.—PARTNERS.

G.

GARDENS,

(Verbum.)

The word "gardens" in an endowment will not give a vicar the tithe of articles of modern introduction, although they might have been originally usually grown only in gardens.
Williams v. *Price* - - - - 156

H.

HAY,

(Tithe of.)

Vide ISSUE, N° 3.—PERCEPTION, N° 2.

HEIR AT LAW.

Vide CONVEYANCE.—INJUNCTION, N° 2.—PRACTICE, N° 9.

HOUSES,

(Dwelling.)

(Tithes of, in London.)

Vide TITHES.

HUSBAND AND WIFE.

Vide PLEADING, N° 7.

I.

INDEMNITY.

Vide INJUNCTION, N° 4.

INFANT.

Vide BILL OF EXCHANGE, N° 2.—CONVEYANCE.

INFORMATION.

Vide PLEADING, N° 8.—PRACTICE, N° 7.

INJUNCTION.

1. The Court will not grant an injunction to a lessee to restrain a party proceeding against him in ejectment, *or* to restrain his landlord from distraining for rent, which he has received notice from the plaintiff in ejectment not to pay to the landlord; because it is, either way,

way, a proceeding which would have the effect of bringing his landlord's title into dispute, which he is not to be permitted to be the means of doing.

Homan v. *Moore* - - - - - 5

2. The Court will grant an injunction to restrain a judgment creditor from taking out execution on his judgment against lands, which had been the property of his debtor, but were sold by him to a purchaser before the creditor obtained his judgment, but which from the invalidity of the conveyance had since descended to the vendor's heir at law.

Prior v. *Penpraze* - - - - - 99

3. The Court will continue an injunction granted to restrain a defendant from proceeding at law, to enforce payment of a promissory note, given to the defendant's testator on the ground that that testator had agreed to accept an annuity in satisfaction of it, and had received a sum of money as part of that annuity on account; although nothing more conclusive had been done by the parties, and no bond or other security given to the grantee, and the whole remained executory.

But they will impose on the party enjoining the action the terms of bringing the money into Court.

Dally v. *Catchlowe* - - - - 147

4. The Court will enjoin a plaintiff proceeding in an action at law on a lost bill of exchange, on the equity of the defendant's right to have a sufficient indemnity.

Davies v. *Dodd* - - - - - 176

5. Where a purchaser has been long (four years) in treaty under contract for the purchase of an estate, and has paid part of the purchase-money, but in so short a time as a fortnight after the last act of negociation, suddenly declares off, and commences an action to recover back the money paid on account, an injunction will be granted to restrain the action, *on motion*, almost as of course. And *semble*, even on *a hearing*, under such circumstances.

Warde v. *Jeffery* - - - - 294

6. Injunction granted on statement of *belief* of the facts constituting the plaintiff's equity, where they must necessarily lie in the knowledge of the defendant, if true, and are not denied by him in his answer.

Scott v. *Becher* - - - - - 346

7. The Court will not continue an injunction to restrain an action on a promissory note, granted *Nisi* on merits charged in the bill, if the defendant deny the plaintiff's equity to the best of his *knowledge, recollection, or belief*; for they hold themselves bound by positive denial in an answer, although it be of *recollection* of circumstances which it appears improbable that, if true, a defendant should *forget*.

Hoyte v. *Hawkins* - - - - 327

8. An injunction will not be continued to restrain an action by bankers for the amount of cheques granted on the alleged equity of an understanding between the plaintiff (in equity) and the defendants, as to certain terms on which such cheques were alleged to be given, (the bill also praying a discovery) the defendants in equity denying any such understanding.

Askam v. *Thompson* - - - 330

9. Injunction refused, on the alleged equity, that since the settlement of accounts, for the balance of which the action sought to be stayed had been brought, the defendant (in equity) had become indebted to the plaintiff

plaintiff (in equity) considerably beyond the amount of such balance, for business done as his agent.
Hirst v. *Peirse* - - - - - 339

10. A defendant being in Court when the order for an injunction is made, is bound by it from *that time*, although it be not formally served till some time afterwards; and *semble*, that an injunction, restraining an administrator from transferring the intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any stock so transferred.
Scott v. *Becher* - - - - - 346

INSPECTION,

(Deed of.)

Vide BILL OF EXCHANGE.

INTEREST.

1. Interest due is not a part of the principal debt due on mortgage, but rather sounds in damages, and it need not be averred, in debt for the principal sum, to have been paid.
Dickenson v. *Harrison* - - - 282

2. But *semble*, such interest may be sued for separately in debt.
Ib.

3. An equity attaching to a bond attaches also to interest paid on it; and where the Court orders a bond to be cancelled, they will also order the interest paid on it to be refunded.
Hitchcock v. *Giddings* - - - - 135

INUENDO.

Vide WORDS (ACTION FOR).

ISSUE.

1. The Court will not make a decree in favour of a rector claiming tithes in kind of lands *not within his parish*, for which he has for many years received a money-payment by way of composition, which the defendant does not pretend to insist on as a modus: nor will they grant a commission, to ascertain the boundaries of such lands, without a previous inquiry whether the plaintiff is entitled to any and what tithes on such lands, by a trial at law on an issue; because such a claim is not *within the recognized common-law right* of a rector.
Sanders v. *Longden* - - - - 117

2. A rector is entitled to an issue as matter of right in cases where he sues only, not where he is defendant.
Williams v. *Price* - - - - 156

3. The Court will not grant an issue to a rector defending a suit for tithe of hay against a vicar who has constantly proved *perception*, notwithstanding his endowment contains an *exception* of that tithe as *due to the rector*, where the latter can *not* show perception.
Parsons v. *Bellamy* - - - - 190

4. An issue will not be granted to try the character of money-payments set up as moduses, where the witnesses state that such payments were apportioned by reference to the poor's rates.
Walter v. *Holman* - - - - 171

5. Where

5. Where the value of a vicarage, as estimated by the usual ancient documents, is inconsistent with the probability of the money-payments set up as moduses, being so old as legal memory, such inconsistency is not sufficient to enable the Court to dispense with an issue, because those documents are not evidence so *conclusive*, as to warrant a decree in the absence of other evidence.
Jee v. *Hockley* - - - - - 87

Vide LACHES.——MODUS.——NEW TRIAL.—TITHES.

J.

JUDGMENT

(By Default.)

Where it does not cure a defect in the declaration.

Vide PLEADING, N° 7.

JURISDICTION.

By an act of parliament, passed 57 Geo. III. the Lord Chief Baron has now a sole jurisdiction in causes in equity.
See the Act - - - - - - 2, 3

JUSTIFICATION

(Of Bail.)

Vide BAIL.

L.

LACHES.

An old former decree in favour of a predecessor of a rector, and a verdict obtained by him on an issue under it, will not assist a suit by him for tithes in kind, arising from lands *not within his parish*, founded on the receipt for many years of a money-payment, in lieu of such tithes, by way of composition (and not pretended by the defence to be a modus,) or preclude the necessity of a new trial at law, if, ever since that decree and verdict, the succeeding rectors have neglected to take advantage of the result of the former suit, and received the same payment as before. On such a claim, a rector has no common-law right.
Sanders v. *Longden* - - - - 117

LANDLORD AND TENANT.

Where a landlord has distrained for rent arrear, and the tenant has replevied, if, in the meantime, they are seized under an extent for a debt due to the Crown, which is satisfied thereout, this Court cannot, in the exercise of its equitable jurisdiction over the Crown process, interfere to enlarge the time for the return of the writ, that the sheriff may in the meantime proceed, under the sanction of the writ, against the defendant's land, for the landlord's indemnity, so as to enable the sheriff to pay the landlord the arrears of rent distrained for, or in any other way use the Crown process in favour of the landlord, under such circumstances, and, principally, because on the return of the levy having been made,

made, the writ would be *eo instanti functus officio.*
Taunton, ex parte, in a cause of *Rex* v. *Hodder* - - - - - - 313

Vide EJECTMENT.

LEASE.

Vide TITHES (IN LONDON).

LESSEE.

Vide INJUNCTION, N° 1.

LIABILITY

(Of Carriers.)

Vide CARRIERS.

(Of Partners after having withdrawn.)

Vide PARTNERS.

LIBEL.

Vide WORDS.

LIMITATION

(Of suits in Equity, for account of Tithes.)

1. Courts of equity are not bound in tithe causes to any limitation, in point of the time for which the tithes are sought, although, *a convenienti*, it has been usual to confine the account to a period of six years, where the Court sees no reason to depart from such usage.
Warden, &c. of St. Paul's, v. *The Dean* - - - - - - - - - 86

2. A plaintiff (indorsee), seeking relief in equity against the acceptor of a lost bill of exchange, is not bound to institute his suit within any given period, although the drawer may, in the meantime, have become insolvent.
Davies v. *Dodd* - - - - - - 176

(Statute of.)

Vide PLEADING (IN EQUITY.) N° 1.

M.

MATERIALITY,

(Of Exceptions.)

(What.)

Vide EXCEPTIONS.

MAXIM.

Ecclesia ecclesiæ decimas solvere non debet, applies only to the clergy of *the same* church.
Warden, &c. of St. Paul's v. *The Dean* - - - - - - - - - 65

MEMORANDA - - pp. 1, 2, 3

MEMORY,

(Legal and Living.)

Distinction between.

Vide NEW TRIAL.

MISTAKE.

(Parties contracting under, is good ground in Equity (without Fraud) for setting aside a Contract.)

Vide CONTRACT, N° 2.

Non-perception of tithes is not an available defence as against a vicar, where it may be attributable to a mistake of the law, as to whether the tithe in dispute was a rectorial or vicarial tithe, so as to destroy the vicar's right.

Leathes v. *Newitt* - - - - 366

See also *Dorman* v. *Curry* - - 109

MODUS.

(Proof of,—Issue on,—and Pleading.)

1. The amount of money-payments laid as *moduses* in answer to a vicar's claim, being totally inconsistent with the value of the vicarage, as estimated by the ancient documents usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted) to induce the Court to dispense with an issue.

It seems to be no objection to the laying a *modus* that it except articles of *modern* introduction, *speciatim*.

Jee v. *Hockley* - - - - - - 87

2. Money-payments, in lieu of tithes, although made as far back as living memory can reach, held not to be moduses, where many of the witnesses state that such payments were apportioned by reference to the poor's rates.

Nor will an issue be granted to try the character of such payments so described by the witnesses' depositions.

Walter v. *Holman* - - - - - 171

An issue will not be granted to try part of a custom, as where a payment has been pleaded by way of modus, and it be proved to be liable to certain modifications not stated to belong to it.

Leathes v. *Newitt* - - - - 370

Vide NEW TRIAL.—PLEADING (IN EQUITY.)

3. Modus of 1*s.* for a milch cow, in lieu of the tithe of milk of such cow, sent to an issue.

Leathes v. *Newitt* - - - - 355

4. Modus "of 1½*d.* for every calf "fallen or dropt in the parish, in "lieu of the tithe of such calf," is not proved, if the evidence add a qualification to the custom; as, if proof is, that where such calf shall be sold within the first year after being calved, a further sum, after the rate of 1*s.* in every 10*s.* of the price at which the calf was sold, is to be paid to the vicar.

Ib.

5. As to the effect of certain ancient documents, and the conduct of parties, given in evidence in a suit for tithes as tending to negative a rector's common-law right in favour of a vicar, claiming against him without proof of perception, the *great* tithes in the *vicarage*, see the documents—(in the Appendix,) (which appear

* *Ante* p. 110.

appear to be of so singular a character, that there have been none among the many ancient records and instruments brought before the Court in tithe causes, which, by analogy in their contents, or by reasoning on their effect, can lead to any conclusion as to their operation as matter of evidence in questions, where, in the absence of positive proof, prescription and usage are so much resorted to as in cases of this description,)—and see the evidence adduced, and the conclusion of the Lord Chief Baron's judgment, where the Court were of opinion, that the effect of such evidence had so obscured the *primâ facie* right of the rector, as that they were obliged to direct an issue to put the case in a course of further inquiry.

Leathes v. *Newitt* - - - - 355

6. A Modus of 5*s.* for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, called renew cows, or cows having had each a calf within the year,—preceded by a modus of three halfpence for every cow called a renew cow, or a cow that has had a calf within the year and is full of milk,—in lieu of the tithe of the milk of such cow, cannot be supported on the ground of inconsistency.—WOOD, B. *dissentiente.*

Layng v. *Yarborough* - - - 383

7. The latter, standing alone, would also be objectionable, because it is not stated what is to be paid for the number of calves under five, or between ten and five.

Layng v. *Yarborough* - - - 383

8. One shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, rank.—It is also bad on the second ground taken to the preceding modus. By WOOD, B. *aliter.*

Ib.

9. Three-pence for a lamb, or 2*s.* 6*d.* for every tenth lamb, in lieu of the tithe of such ten lambs, not so rank as to be decided on by a Court of Equity without an issue.—GRAHAM, B. *dubitante.*

Ib.

10. One shilling for every tenth pig, in lieu of the tithe of such ten pigs, rank, and not sufficiently particular as to intermediate numbers, and therefore bad.—WOOD, B. *contra.*

So as to geese.

Ib.

11. A modus for tithes of articles of modern introduction cannot be supported, because of the anachronism.

Ib.

12. Eighteen-pence in lieu of tithe of rape-seed, when sold in the seed, is bad for uncertainty, and being capable of fraud.—WOOD, B. *dissentiente.*

Ib.

The following moduses held good, and issues decreed as to them:

13. 4*d.* for messuage and garth.

14. 2*d.* for every cottage and garth.

15. 1*d.* for every strip cow.

16. 4*d.* for every foal.

17. 2*s.* 6*d.* for every tenth lamb, in lieu of the tithe of such ten lambs.

Ib.

(As to laying.)

Vide PLEADING IN EQUITY, N° 3.

MORTGAGE,

(Agreement for.)

Vide SPECIFIC PERFORMANCE.

MOTIONS.

1. To be made in causes pending before the Lord Chief Baron, in the exercise of his sole and exclusive jurisdiction, must be made before his Lordship when sitting alone only.
Anon. - - - - - - - - - 309

2. Counsel can only make two motions each, successively.
Anon. - - - - - - - - - 345

MOVING,

(Rule respecting.)

Vide MOTION.

N.

NEGLECT

(Of Right.)

Vide LACHES.—PERCEPTION.

NEGLIGENCE

(In Carriers.)

(For what they shall be answerable notwithstanding Notice.)

Vide CARRIERS.

NEW TRIAL.

Where an occupier of lands is plaintiff in an issue directed by this Cour to try a *modus*; and proves on the trial that the defendant (the vicar) and his predecessors have not received tithe of hay within a certain township, either in kind or *sub modo*, within *living* memory: and that the vicar and his predecessors have been in possession of a piece of meadow within the same township, said in some of the terriers produced, to have been given in lieu of tithe hay: and no evidence is adduced to rebut such a case on the part of the defendant; if the jury find for the defendant, under the direction of the Judge, "that they must be satisfied from the evidence that the defendant and his predecessors have held the meadow in lieu of tithes from before the commencement of legal memory,"—it is not ground for a new trial.
Adams v. *Evans* - - - - - - 14

Vide BILL OF EXCHANGE, N° 2.—COSTS, N° 5.

NONPAYMENT

(Of Costs.)

Vide BAIL.

NOTICE.

1. In what case carriers not protected by.

Vide CARRIERS.

(Of Trial.)

2. Rule as to what time before, to be given—*regula generalis* - - 4

O.

ORDER

(For Injunction)

1. A defendant being in Court, when the order for an injunction, is bound by it from that time.
Scott v. *Becher* - - - - - - 346

2. The order cannot regularly be served, before it is formally passed and entered.
Ib.

P.

PARTIES,

(In Pleadings.)

1. Drawer of bill of exchange lost not necessary to be made a party to a suit in equity against the acceptor.
Davies v. *Dodd* - - - - - 176

2. A rector ought not to be made a defendant in a vicar's suit, for an account of small tithes charged to be withheld by occupiers, on a claim by the rector.
Williams v. *Price* - - - - 156

Vide BANKRUPT, N° 1.

PARTNERS.

(What Dealings with new Firm does not discharge former Partners who have gone out.)

1. A person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons—discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common

common course, and that for a period of four years, and until they become insolvent.

Nor are those circumstances sufficiently strong to justify such a case being left to a jury.—GARROW, B. *dubitante*.

Gough v. *Davies* - - - - - 200

2. In a case—where an attorney has prevailed on a young man, about to be admitted, to become his partner in business for a certain term, and to pay him, as a consideration, a considerable sum of money, a part to be paid on the execution of the articles, and the remainder by yearly instalments—if during the term the attorney sue out, in character of petitioning creditor, a commission of bankruptcy against the person so having become his partner, whereby, on his being declared bankrupt, the partnership is necessarily dissolved—the Court will not only not permit him to sue for the instalments accruing due afterwards, but will order him to refund the money already received by him in consideration of the partnership, except as far as shall be commensurate with the period of the actual duration of such partnership.

So, also, if the attorney has himself since become bankrupt, and assignees have been chosen.

In such a case, the Lord Chief Baron allowed the plaintiff costs, and refused them to all the parties actually defending the suit.

Hamil v. *Stokes* - - - - - 161

PARTNERSHIP.

Vide PARTNERS.

PAYMENT

(Of Money into Court.)

1. Where the Court order an injunction to be continued in a case doubtful on the merits, they will order the sum proceeded for to be paid into Court.

Dally v. *Catchlowe* - - - - 147

2. After payment of money into Court by a defendant, in an action brought against him on the 2d and 3d Edw. VI. by a farmer of tithes, he cannot object to the plaintiff's title to the tithes; because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages.

Broadhurst v. *Baldwin* - - - 58

(Of Tithes in London.)

For new built houses on old sites—how to be estimated.

Kynaston v. *The East India Company* - - - - - - - - 84

PERCEPTION.

1. Where there exists any reason which may have led succession vicars into a mistaken notion that they had no right to tithes, or that their right was commuted,—(as where vicars were capable of binding their successors) the argument founded on the vicar's non-perception fails.

Leathes v. *Newitt* - - - - 355

2. A vicar claiming tithe of hay, may establish his right by sufficient

proof of perception during living memory, where none can be shown to have been enjoyed by the rector, although his endowment *actually negative his right to that title expressly*, and state it to belong to the rector, on the presumption of a subsequent endowment, which the Court is bound to adopt.

Parsons v. *Bellamy* - - - - 190

3. Perception by means of a composition, which has always been understood by the parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind.

Ib.

4. Perception of tithes by a vicar for any considerable number of years, where its inception cannot be shown, if it is not met by proof of perception by the rector or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior, and of its having been founded on an endowment. Nor will the court grant the rector an issue in such a case.

Ib.

Vide EVIDENCE.—MODUS, *passim.*

PERFORMANCE

(Of Agreement for a Mortgage.)

Vide SPECIFIC PERFORMANCE.

PLEA

(To Breach assigned.)

1. To a breach assigned in an action on a contract to supply a cargo in time for the plaintiff to load, and sail with it to England with the next June convoy, provided the ship arrived out of the shipping port and was ready to load, and notice was given to the defendant's agents, at a certain period before the sailing of the convoy, that though, &c. (averring the arrival and being ready to load) the defendant did not provide a sufficient cargo in time to enable her to sail with that convoy, *but detained the ship for a certain time after the sailing of the convoy*, whereby, &c.: it is no answer to plead that the defendant did not *so detain the said ship*, &c. the gist of the action being *the not loading her*, &c.

Deffell v. *Brocklebank* - - - - 36

(Of Statute of Limitations.)

Vide PLEADING IN EQUITY, *passim.*

PLEADING.

1. In an action on a covenant,—(that on the arrival of the plaintiff's ship at a certain port, where he undertook to receive the defendant's cargo, and sail for England therewith with the next June convoy, provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy,)—the defendant would provide a cargo of produce in time for her to load the same, and join the June convoy for England, provided she arrived out and was ready to load, and notice thereof was given to the agents of the plaintiff in error, sixty-five running days previous to the sailing of the said convoy, and on her arrival, &c. receive the said cargo and pay the current freight;)—it is not a condition precedent to the defendant's part of the contract, that the ship should

should so arrive, but he is still bound to supply a cargo, though not in time to enable the plaintiff to sail with that convoy.

Deffell v. *Brocklebank* - - - 36

2. An objection to a count in an information on the 8th Anne, cap. 7, sec. 17, charging that the defendant was *assisting* or *otherwise concerned in*, the unshipping prohibited and unaccustomed goods,—that it is a charge of *two distinct offences* by the *same count*, and therefore bad, either for duplicity or uncertainty,—was not allowed by the Court; who held, that the words did not involve two distinct offences, and that it was the established and ancient practice, *cursu Scaccarii*, so to charge the offence in such informations.

Attorney General v. *Farr* - - 122

3. An administratrix claiming under a marriage settlement to retain her debt, need not, in pleading the articles to an action brought against her for a simple contract debt, due from the intestate, state that they were in writing or under seal, or plead them with a *profert*, or set out the consideration more particularly; the object of such a plea being merely to show her right to retain a debt accruing to her thereby, against other creditors of equal degree, and to let in evidence in support of such retainer, on the plea of *plene administravit*.

Harry v. *Jones* - - - - - 89

4. Plea to an action of debt brought by a sheriff on a bail bond,—that it was given to the sheriff on an attachment against a defendant for non-payment of costs, held good on general demurrer, because such an attachment is not bailable.

Phelps v. *Barrett* - - - - - 23

(Case for Words,—what Words will not support such an Action.)

5. These words, "I will take him to Bow-street on a charge of forgery," are not actionable, because they do not amount to charge the person of whom they are spoken with felony.

Harrison v. *King* - - - - - 46

(Usage of the Court not matter of Conclusion to the Country.)

6. It is not matter of conclusion to the country, that the proceedings which have been had are not conformable to or authorized by the usage and practice of the Court; for evidence of such usage is not admissible on that issue.

Rex v. *Scott* - - - - - - 11

(Averment—what necessary.)

7. In an action of *assumpsit*, brought against a defendant for money lent to his wife, it must be alleged to have been lent at his request, or it will be insufficient; and that even after a judgment has been suffered by default.

Nor is it cured by a count for money lent to the defendant and his wife, at the request of him and his wife; although it is stated in both counts that the husband promised to pay.

Stone v. *M'Nair* - - - - - 48

8. It is not necessary to *state*, in an information against a maker of vinegar for the duties of excise, under the 43d Geo. III. chap. 69, schedule A. that the liquid was preparing *for sale:* that may be *proved*.

Attorney General v. *Green* - - 224

9. Declaration in debt for 800 *l.* on a covenant (in a mortgage deed for securing payment on a future day certain,

certain, of that sum and interest) that the defendant would pay the said sum of 800*l.* *with interest* on, &c. with breach that he did not, nor would pay the said sum of 800 *l.* on, &c. held good on special demurrer; although there was no averment that the interest had been satisfied, or that the plaintiff abandoned his claim thereto.

A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for independently of the other.

Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, *semble*, it may be sued for in debt.

Dickenson v. *Harrison* - - - 282

Vide BAIL.—TRAVERSE.—VARIANCE, N° 3.

PLEADING IN EQUITY.

PLEA

(Of Statute of Limitations.)

1. The Statute of Limitations cannot be pleaded by trustees, in answer to a charge of breach of trust, to defend them from the consequences of neglecting their duty in having sold an estate charged with the payment of a sum of money, without satisfying that demand.

Milnes v. *Cowley* - - - - 103

(Of Account stated.)

2. Plea of account stated and settled, to a bill for an account, must be supported by averments showing an actual (though not final) settlement, as from security being given for the balance, and that all vouchers have been delivered up.

Nor is it sufficient that the last fact is stated in a schedule of the statement of the account referred to by the answer, without a positive averment of it in the plea.

Hodder v. *Watts* - - - - - 8

3. Where a modus set up by way of defence to a bill for tithes, against the occupier of a certain farm, was pleaded thus—" *that the said farm is parcel of the demesne lands of a certain mansion-house, called, &c. and which comprizes, &c.; for which, from time, &c. the modus has been payable by the proprietor of the said mansion-house and demesne lands.*" it was held to be ill laid, for want of a sufficient description of the lands claiming to be protected by it.—And that although the payment was clearly proved; for pleading a modus for a whole district, and then averring that the particular lands are part of such district, without describing it by metes and bounds, is insufficient and bad, and cannot be aided by the evidence applying the description by its boundaries.

Therefore, an account was decreed, but *without costs*, in consideration of the merits of the defence.

Gillibrand v. *Scotson* - - - 267

4. It is not a good plea to a bill filed by one residuary legatee (to whom, with others, the debts due from a concern in which the testator had been a partner with one of his legatees, had been bequeathed,) against the others, for an account of monies due from the partnership to the testator, charging the defendant

fendant with owing the concern various sums of money, having possession of the partnership-books; that all the monies due from the partnership to the testator, at the time of his death, consisted wholly of money lent by him to the defendant; and that (as the fact was) the testator had, by his will, forgiven and released the defendant from all monies lent and advanced by him during his life-time, the release by the devise being treated as referring to specific sums advanced independently of the partnership debts.
Hanson v. *Hanson* - - - - 168

5. Where a Modus, was ill laid for want of sufficient description of the lands alleged to be covered by it, costs were refused on an account being decreed for plaintiff.
Gillibrand v. *Scotson* - - - 267

6. It seems to be no objection to pleading a modus that it is laid with an exception of articles of modern introduction, *speciatim*.
Jee v. *Hockley* - - - - - - 87

Vide MODUS, *passim*.

PLENE ADMINISTRAVIT.

Vide PLEADING, N° 3.

PRACTICE.

1. A plaintiff is allowed the vacation of the term in which the decree is pronounced, and the following term, to draw up the decree, but not the vacation of that term.
Calvert v. *Dignum* - - - - 133

2. This Court will now order it to be referred to the Master to compute principal and interest on a promissory note or bill of exchange, &c. (as is the practice in the other Courts) on motion.
Biggs v. *Stewart* - - - - - 134

3. As to the order of time in which the business of the Court is to be proceeded in, *vide* Notice published in the Court, 28th April 1817 - 21

4. A cause cannot be heard against some of several defendants, in the absence of the rest, although it is not intended to proceed against them.
The bill must first be formally dismissed as to them.
Rumney v. *Morgan* - - - - 266

5. Service of notice of the allowance of a writ of error, (bail in error not having been put in,) on the tipstaff having brought the defendant in custody into Court, (where the notice of the allowance of the writ was tendered to him) for the purpose of his being charged in execution, is not sufficient to give it the effect of a *supersedeas*, so as that the defendant may apply for his discharge, after having been charged in execution.
It should also be served on the plaintiff's attorney.
Smith v. *Carruthers* - - - - 289

6. Had bail in error been perfected, it might have been ground for a special application to the Court, to discharge the defendant out of custody.
Ib.

7. The Court will not make an order that the witnesses of a defendant claiming goods seized by the customs, may be allowed to inspect them before the trial of the usual

information in *rem*, or an affidavit of the party that he believes he shall be able to prove by such witnesses that the goods are not contraband, but were made in this country, and for the most part by the witnesses, who it is required may be allowed to see them.
Attorney General v. *Harding* - - 381

8. Sheriff claiming extra allowance, his course is to apply to the Court, that it may be referred to the Deputy Remembrancer to ascertain what he may be entitled to.
Rex v. *Fereday* - - - - - - 131

9. It is the practice in equity to keep a heir at law before the Court, even though he admit the will; *semble*, for the purpose of giving more complete effect to any decree which the Court may make, and which might require his concurrence.
Jackson v. *Radford* - - - - 274

10. A plaintiff having obtained an order for an injunction, ought not to serve it before it is formally passed and entered; and if the order so served be wrongly drawn up to the prejudice of the defendant, the Court will treat and punish it as a *contempt* or application for that purpose; and all the *costs* incurred by such a proceeding will be ordered to be paid by the plaintiff.
Scott v. *Becher* - - - - - - 346

11. The Court of Error will not reverse a judgment of the Court of K. B. merely on the ground of the defendant in error not appearing, without going into the errors assigned.
Harrison v. *King* - - - - - 46

(As to Motions.)

12. Motion in causes to be heard before the Lord Chief Baron, in the exercise of his sole jurisdiction, can only be made before his Lordship when sitting in the inner Court.
Anonymous - - - - - - - 309

(As to amending Process.)

13. Where a *scire facias*, founded on an inquisition, misrecites the inquisition, and therefore fixes by such recital a day on which the debt had been found to be due, differing from the true day named as in the inquisition, the Court will give leave (on cause being shown) to amend the writ, on payment of the costs, &c. even after the defendant have pleaded.
Rex v. *Scott* - - - - - - 181

14. Same point.
Regina v. *Hoble* - - - - - 181
—— v. *Peters* - - - - - - 182

PRAYER

(Of Bill.)

What subject matters inconsistent.

Vide ELECTION.

PREMIUM.

Vide BANKRUPT, N° 2.

PRESUMPTION

(Of Endowment.)

Vide EVIDENCE, *passim*.—PERCEPTION.—USAGE.

PRINCIPAL AND SURETY.

Vide WITNESS, N° 2.

PRISONER.

Vide COSTS, N° 5.

PROFERT.

Vide PLEADING, N° 3.

PROMISSORY NOTE.

Vide PRACTICE, N° 2.

PROMOTIONS.

Vide MEMORANDA.

PROOF.

(Of Title to Tithes.)

Rector claiming small tithes against a vicar endowed generally, has no common-law right to presumption in his favour, and therefore held to *strict* proof of his title.
Dorman v. *Curry* - - - - - 109

Vide TITHES.—PERCEPTION.—EVIDENCE, *passim*.

PROPERTY TAX.

Vide CONSTRUCTION OF STATUTES.

Q.

QUERIED POINTS.

1. Ruled at *Nisi Prius*, by the Lord Chief Baron, that a person having entered into a bond, with sureties to the Crown, is not an admissible witness in a *scire facias* against the surety, to prove that he had not broken the condition.—*Quære*, (the principal having been previously released by such surety.)
Rex v. *Horton* - - - - - 150

2. *Quære*, if it be not necessary (on a motion made to set aside an award on the ground that all the witnesses for the party against whom the award was made were not examined by the arbitrator) to shew that such examination was, in point of fact, required; or whether a witness having been named as being intended to be examined, be not tantamount to such a requisition.
Bedington v. *Southall* - - - 232

3. *Quære*, whether a joint commission, sued out against three persons, pending two previous separate commissions against two of them, is valid in *law* as against the third, and whether the assignees appointed under the two former commissioners, (who were also assignees under the last,) can maintain an action of trover to recover property of such third person jointly with him; or whether it be absolutely void at law, so that the person who is the object of

of it cannot so join in the action: or whether such subsequent commission be merely voidable, and suspends his right to join till the former commissions are established, or the last superseded?
Butts v. *Bilke* - - - - - 240

R.

RANKNESS.

Vide MODUS, *passim.*

RATE.

(Of Tithes, in London.)

Vide TITHES (*in London*).

RECEIPTS.

Vide EVIDENCE.

RECEIVER.

The Court will appoint a receiver of an intestate's personal estate, when the administrator is sworn to be insolvent, before his answer be put in; although the fact of his being abroad (stated also in the plaintiff's affidavit) be denied by an affidavit filed in answer thereto.
Scott v. *Becher* - - - - - 346

RECORD.

(Of what Record of Condemnation shall be Evidence.)

Vide EVIDENCE, N° 1.

RECTOR.

Vide PERCEPTION.—TITHES.—TITLE.

REFERENCE,

(To Master to compute, &c. on a Promissory Note or Bill of Exchange.)

Vide PRACTICE, N° 2.

(To Deputy Remembrancer to report Facts.)

Vide EXCEPTIONS.

REGULA.

Vide THE CROSS REFERENCES FROM RULE (OF PRACTICE.)

RELEASE.

Vide WITNESS.

RELIEF,

(In Equity.)

Vide BANKRUPT, N° 2.—BILL OF EXCHANGE, N° 1.—CONTRACT, N° 2.—INJUNCTION, *passim.*

REMAINDER.

(Contingent.)

Vide CONTRACT, N° 2.

RENT,

Vide TITHES *(in London.)*

REPLICATION,

(Withdrawing.)

Vide AMENDMENT.

REPORT.

(Exceptions to Deputy Remembrancer's.)

Vide EXCEPTIONS, Nos 1, 2.

REPOSITORIES.

(Of Terriers and Vicars books, what the proper Custody of, to render them admissible in Evidence.)

The Registry of the Bishop—of the Archdeacon of the Diocese—and the Church Chest.

Armstrong v. *Hewitt* - - - 218

REQUEST,

(Pleading.)

Assumpsit for money lent a wife must aver request of husband, or it will be error, even after judgment by default.

Vide PLEADING, N° 7.

RESIDENCE.

Vide NOTICE OF TRIAL.—CONSTRUCTION OF STATUTES, Nos 1, 2, 3.

REVENUE LAWS.

Vide CONSTRUCTION OF STATUTES, N° 4.—PRACTICE, N° 7.

RULE

(Of Practice.)

Vide NOTICE OF TRIAL.—PRACTICE.—SITTINGS OF THE COURT.

S.

SALE

(Of Bill of Exchange.)

Vide USURY.

SCHEDULE.

(Reference to, as Part of Plea.)

Vide PLEADING IN EQUITY, N° 2.

SCIRE FACIAS.

Where the Court will permit it misreciting an inquisition to be amended after plea, and on what terms.

Vide PRACTICE, N° 13.

SEEDS,

(Tithe of.)

Vide TITHES, N° 1.

SERVICE OF PROCESS.

Vide INJUNCTION, N° 10.—PRACTICE, N° 5.

SET-OFF.

Charges for business done, as attorney or agent, will not raise an account, so as to give such attorney or agent an equity against the holder of his promissory note, as money mutually due on either side will, for such demands are rather matter of set-off.

Hirst v. *Peirse* - - - - - 339

SETTING ASIDE PROCEEDINGS.

Vide AWARD.

SETTLEMENT,

(Marriage.)

Will be received in support of claim of retainer, and plea of *plene administravit*, against an action brought by a simple contract creditor against an administrator.

Vide PLEADING, No. 3.

SHERIFF.

1. Sheriff, claiming extra allowance, must apply to the Court, who will refer it to the Deputy Remembrancer to ascertain what he is entitled to.

It is a rule to show cause.

Rex v. *Ferreday* - - - - - 131

2. If a sheriff's officer, who arrests a defendant, demand and receive from him a larger sum than he is liable to pay, as a caption fee, and for the expense of the bail bond, &c. the Court will, on motion, order it to be referred to the Master, to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application.

Watson v. *Edmonds* - - - - 309

Vide BAIL, N° 1.—LANDLORD AND TENANT.

SITTINGS OF THE COURT.

(Rule as to.) - - - - - - 22

SOLICITOR,

(Change of.)

A solicitor who has appeared for parties, defendants in a suit in Chancery will not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves, against others of them, the solicitor making affidavit that he

he is not possessed of any secrets which might be used to the prejudice of such other defendants, or knowledge of any facts unknown to his clients.

It appears to be necessary that a solicitor, in such a case, should be shown to be possessed of knowledge of matters which might give him undue advantage to found such a notion.

Robinson v. *Mullet* - - - - 353

(Bill of.)

Vide Costs, N° 8.

SPECIFIC PERFORMANCE

(Of Contract.)

Bill for specific performance of an alleged agreement for a mortgage, entered into by the defendant's testator, for securing money advanced to him on the faith of such agreement (and other debts), *semble*, not maintainable under the circumstances stated in the case.

Jackson v. *Radford* - - - - 274

Vide Contract.

STATUTES.

(Construction of.)

Vide Construction of Statutes.

(Contained in this Volume.)

John.

Magna Charta.

(Chattels to be sold in satisfaction of the Crown's Debt before the Debtor's Lands are resorted to.) 319

Henry VI.

23. ch. 10. (Authorizing Sheriff to take Bail.) - - - - - - 24

23. ch. 9. (Prohibiting Extortion under colour of Process.) - 26

Henry VIII.

37. ch. 12. (Tithes in London.) - 66

25. ch. 35. (Extent.) - - - - 318

Edward VI.

2 & 3. ch. 13. (Debt for not setting out Tithes.) - - - - - 58

James I.

21. ch. 7. (Statute of Limitations.) 106

Anne.

8. ch. 7. (Smuggling.) - - - 122.

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12. ch. 16. (Usury.) - - - - 53

William and Mary.

3. ch. 11 & 12. (Tithes of Linseed.) - - - - - - - - 386

George I.

3. ch. 15. (Extent, Poundage.) - 131

George II.

2. ch. 23. (Taxing Costs.) - - 281

George III.

25. ch. 35. (Right of the Crown to proceed to a Sale of its Debtors Lands.) - - - - 328
38. ch. 41. (Income Tax.) - - 186
. ch. 89. (Exemption from Salt Duty.—Fish Curers.) - 150
39. ch. 13. (Income Tax.) - - 186
41. ch. 62. (Income Tax.) - - 186
42. ch. 93. (Vinegar.—Excise Duty.) - - - - - - - - 225
46. ch. 65. (Property Tax.) - - 183
57. (Jurisdiction.—Lord Chief Baron.) - - - - - 2

SUPERSEDEAS,

(By Writ of Error.)

Vide PRACTICE, N° 5.

SURETY.

Vide WITNESS.

T.

TAXATION

(Of Costs.)

Vide COSTS, N° 8.

TAXES.

Vide EXTENT.—CONSTRUCTION OF STATUTES.

TENDER

(Of Value.)

Not necessary to be negatived in an affidavit made to hold a defendant to bail in trover.

Anon. - - - - - - - - - 306

TERMS

(Imposed on granting Motions.)

Vide INJUNCTION, N° 3.—COSTS, N° 11.

TERRIER,

(Copy of lost—not admissible.)

Vide EVIDENCE, N° 11.

TIME.

How long a plaintiff is allowed to draw up a decree,—and when the defendant may do it.

Vide PRACTICE, N° 1.

(Not essence of Contract.)

Warde v. *Jeffery* - - - - 294

TITHES.

Vide ALTERAGIUM.—CURTILAGE.—COMPOSITION REAL.——EVIDENCE.—ISSUE, *passim*.—LACHES.—LIMITATION.—MODUS, *passim*.—NEW TRIAL.——PAYMENT OF MONEY INTO COURT.—PERCEPTION.—PROOF.—USAGE.

1. A rector claiming tithe of seeds against a vicar, endowed of all small tithes except hay, on the ground of a presumption, that as the former has had perception of the tithe of seeds, notwithstanding the terms of the endowment of the latter, who had also had immemorial perception of the tithe of corn of certain lands, *ultra* his endowment, an ancient exchange must be presumed of vicarial for rectorial tithes—will be held to *strict* proof of his title to the tithes sought; and he must show, by satisfactory evidence, that the vicar has granted them back to him, or made the alleged exchange. Nor is his perception of the tithe in question available against perception by the vicar, if the subject-matter of dispute be one of those which were formerly doubtful, as to their being a rectorial or vicarial tithe.

Dorman v. *Curry* - - - - - 109

2. Nor can the rector insist on an issue in such a case: for no presumption will be raised in his favour, because he is in the situation of a claimant contesting his own grant, and has clothed the vicar whom he has endowed, with his inherent common-law right.

Note:—Such a bill dismissed, *with costs*.

Ib.

(*In London.*)

1. The dwelling-house, &c. of the deanery of *St. Paul's* in *London*, is not exempt from the payment of tithes to the warden and minor canons, under the 37 Hen. VIII. c. 12.

Warden, &c. of St. Paul's v. *The Dean*, 65

2. The rate, according to the amount of which, the payment for such tithes is to be computed, is 2*s*. 9*d*. in the pound, on the fair yearly rent, or actual annual value of the premises to be let, as in the case of all other houses paying tithes.

Ib.

3. The maxim *ecclesia ecclesiæ decimas solvere non debet*, does not apply to the circumstances under which the dean of St. Paul's is connected with the warden and minor canons as parson of St. Gregory. It is confined to the clergy of the *same church*.

Ib.

4. The dean is not, within the meaning of the exemption in the Act, a great man.

Ib.

5. Where there has been no new lease granted for many years, the clergy of *London* are to be paid for their tithes, on the expiration of the old one, according to the improved annual value; and when any fine is paid on taking a new lease, in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value.—New houses on old sites are liable according to the actual annual value.

Ib.

6. New houses built on old sites which have never paid any tithes, are liable

liable to pay tithes after the rate of 2*s.* 9*d.* in the pound on the improved annual value.
Kynaston v. *The East India Company* (*in notis*) - - - - - - - - 84

TITLE

(Of Rector.)

Vide ISSUE.—PERCEPTION, *passim.* —TITHES.

(Of Vicar.)

Vide ISSUE.—MODUS.—PERCEPTION.—TITHES.

(Reference of, to Deputy Remembrancer.)

Vide EXCEPTIONS.

(Of Landlord, as with regard to his Tenant.)

Vide EJECTMENT.—INJUNCTION.

(Of Act of Parliament.)

As to setting it out in pleading.

Vide VARIANCE.

(To Premises sold under a Decree.)

Purchaser not bound to accept a *primâ facie* title, though reported good by the Deputy Remembrancer.
Eyton v. *Dicken* - - - - - - 303

TRAVERSE.

A defendant in an Extent, will not be let in to enter a claim and traverse the inquisition, after having attempted, by rule obtained on affidavit, to quash the proceedings.
Rex v. *Bickley* - - - - - - 323

TROVER.

It is not necessary to negative a tender of the value in an affidavit to hold a defendant to bail in trover, although a tender have been actually made.
Anon. - - - - - - - - - 306

Vide BANKRUPT, N° 2.

TRUSTEES.

Vide CONVEYANCE.—PLEADING *(in Equity.)*

U.

USAGE.

(How far Evidence.)

Vide EVIDENCE.—MODUS.—PERCEPTION.

1. Usage is the broad ground of presumption in favour of the vicar's endowment, and if there be an endowment in proof, expressing of what tithes his vicarage shall be endowed, if any tithes received by the vicar be not among them, a subsequent endowment will be presumed.
Williams v. *Price* - - - - - 156
And vide *Cunliffe* v. *Taylor*, *ante*, Vol. II. p. 329.

2. Usage and practice of the Court not matter of conclusion to the country, for evidence of such usage is not admissible on a plea which puts it in issue.

Vide PLEADING.

3. A certain form of pleading in an information being, according to ancient and established practice, *cursu Scaccarii*, held to be a sufficient answer to an objection taken to it, on the ground of being double and uncertain.

Attorney General v. *Farr* - - 122

Vide ENDOWMENT.—EVIDENCE.—PERCEPTION.

USURY.

If the drawer of a bill of exchange (which has been accepted by the drawee) made payable to his own order, and endorsed by him, gets another person to procure cash for it, who does so by allowing more than the legal discount to be taken on it, it is usurious: for not being drawn for the benefit of such third person, but of the drawer himself, it is not a sale of the bill by such third person, but an advance of money by way of discount to the person making it, and on his credit.

Such a bill getting into the hands of the Crown, under an extent against the party who discounted it, is equally invalid as if it were still in his possession.

Rex v. *Ridge* - - - - - - - 50

V.

(Value Annual—as distinguished from Rent.)

Vide TITHES *(in London.)*

VARIANCE.

It is not a fatal variance (after verdict) where an information, professing to set out the title of an Act of Parliament, describes it as intituled, An Act (&c.) for repealing duties on salt, and the drawbacks (&c) "*thereon*"—the title being (in fact) in the same words, with the exception of having the words "*thereout*" instead of "*thereon:*" (and adding) and for granting other duties (&c.) "*thereon;*"—the concluding word being the same.

Attorney General v. *Horton* - 237

VERDICT

(On Issue.)

Vide NEW TRIAL.

VICAR.

Vide EVIDENCE.—MODUS.—PERCEPTION.—TITHES.

VINEGAR,

(Making for Sale.)

Vide CONSTRUCTION OF STATUTES, N° 4.

W.

WITNESS.

1. All the witnesses of the party against whom the award is made must have been examined, and in his presence, or it will be a ground for setting the award aside; but that must be made clearly to appear.

Quære, if it be not necessary to show that such examination was, in point of fact, required; or whether a witness, having been named as to be examined, be not a requisition.

Beddington v. *Southall* - - - 232

2. Ruled at *Nisi Prius*, by the Lord Chief Baron, that a person having entered into a bond, with sureties to the Crown, is not an admissible witness in a *scire facias* against the surety, to prove that he had not broken the condition.—*Quære*, (the principal having been previously released by such surety).

Rex v. *Horton* - - - - - 150

WORDS,

(*Action for.*)

1. Cannot be maintained against one saying, "I will take him to Bow-street on a charge of forgery," because the words do not amount to charge the person of whom they are spoken with felony,—nor are they capable of any such unequivocal inuendo.

Harrison v. *King* - - - - - 46

(*Technical or Obsolete, or having a Legal Signification, though not Technical.*)

2. For explication of, *see* the word.

WRIT

(*Of Error.*)

What necessary to make it a *supersedeas*.

Vide PRACTICE, N° 5.

END OF VOL. IV.

ERRATA:

Page 150, Marginal note, *for* "Rules" *read* "Ruled."
163, Line 12, *dele* "so that."
309, Marginal note, *for* "in fee" *read* "as a caption fee."

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